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In The

Supreme Court of the United States

October Term, 1997

NANCY KIMBALL KRIPPENE, Individually, and as the Executrix of the Estate of URBAN M. KRIPPENE, Deceased,

Petitioner,

vs.

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA and CHATHAM COUNTY, GEORGIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH B. BERGEN
Counsel of Record
FREDERICK S. BERGEN
Attorneys for Petitioner
123 East Charlton Street
Savannah, Georgia 31401
(912) 233-6600

145324

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

111pp

QUESTION PRESENTED

Whether a custom or policy and the arbitrary and deliberate indifference of the Respondents' Police Department regarding the known intentional conduct of its police officers who arbitrarily abused their governmental power in operating police vehicles in a manner that shocks the conscience, rose to the level of a Constitutional deprivation that would support relief under 42 USC Section 1983 for the death of Petitioner's decedent.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding other than the Petitioner Nancy Kimball Krippene, Individually and as the Executrix of the Estate of Urban M. Krippene, deceased, and the Respondents Board of Commissioners of Chatham County, Georgia, and Chatham County, Georgia.

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Petitioner, Nancy Kimball Krippene, Individually and as the Executrix of the Estate of Urban M. Krippene, deceased, respectfully requests a Writ of Certiorari to review in this Case the *Per Curiam* Opinion of the Court of Appeals for the Eleventh Circuit affirming the Order and Judgment of the United States District Court for the Southern District of Georgia.

OPINIONS BELOW

The *Per Curiam* Opinion of the Court of Appeals citing *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996) as authority directly supporting the proposition, is not published (App. A).

The Order of the United States District Court for the Southern District of Georgia upon which Judgment was entered, *Nancy Kimball Krippene v. Board of Commissioners of Chatham County, Georgia, et al.*, Case Number CV496-211, also is unpublished (App. B).

STATEMENT OF JURISDICTION

The *Per Curiam* Opinion (Judgment) of the United States Court of Appeals for the Eleventh Circuit was entered on December 1, 1997. This Court of Appeals denied a timely Petition for Rehearing and Suggestion of Rehearing En Banc on February 23, 1998 (App. C).

The jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

To fully appreciate the significance of the issues presented by this Petition, it is essential to consider both its background and the proceedings below.

A. Background of District Court Order and Judgment

This Case involves a claim by the Appellant Nancy Kimball Krippene seeking damages from the Respondents as the Surviving Spouse of her late Husband, Urban M. Krippene, and as the Executrix of

the Estate of her deceased Husband. The Complaint is based on the provisions of 42 U.S.C. Section 1983 and alleges that as a result of Chatham County, Georgia having a "custom or policy" concerning preferential treatment by Policymakers of its Police Officers who violated traffic laws placing the public at risk and of also failing to train, re-train and adequately discipline one of its County Police Officers, Bryan D. Smith, who had a lengthy record of Official misconduct, that included driving-related misconduct, this custom or policy and this misconduct by Bryan Smith caused a Constitutional deprivation to and the death of Urban M. Krippene when Officer Smith drove a Chatham County Police vehicle to work on November 18, 1994 in an unjustifiably high rate of speed and collided with a vehicle being driven by the late Urban M. Krippene. (*See Generally* Background recited in Division I, p.1, Summary Judgment Order dated April 16, 1997) (App. B)

B. The Proceedings Below

The Petition before this Court arises from the Complaint of Nancy Kimball Krippene, as Surviving Spouse and Executrix of the Estate of her late Husband, Urban M. Krippene, filing the above stated 42 U.S.C. Section 1983 action initially brought against [Ronald Lowe, Sr., Individually and as Chief of Police of Chatham County Police Department who was later dismissed as a party by Consent Order], the Board of Commissioners of Chatham County, Georgia and Chatham County, Georgia, based on the following facts:

Habitual pattern of violations by Officer Bryan D. Smith

The Bryan Smith termination letter signed by Ronald Lowe as Chief of Police of Chatham County Police Department, dated January 12, 1995, established that Chatham County Police Officer Bryan D. Smith, during his employment with the Chatham County Police Department (from April 13, 1991 to the time of his termination on January 12, 1995), had a habitual pattern of repeated incidents of poor judgment, reckless operation of Police vehicles, negligence and failure to follow Departmental Policy. (Bryan Smith Termination Letter, Court of Appeals Record R3-36-Exhibit A, App. D)

The Petitioner contends that the failure on the part of Chatham County to take remedial steps regarding its Police Officers, that included Bryan Smith, amounted to deliberate indifference or tacit authorization by the County of the offensive acts committed by its Police Officers, including Officer Smith during his employment, that rose to the level of a Constitutional deprivation of the rights of the late Urban M. Krippene.

Officer Smith had been previously employed by the Chatham County Sheriff's Department and had received a Two Year Performance Evaluation by the Chatham County Sheriff's Department that was maintained in Bryan Smith's Human Resource File with Chatham County stating: "Your Two Year Evaluation is totally unacceptable. Your Supervisors, Lt. Powell, Sgt. Hood and Sgt. Kutchings,

agree that there has been an obvious decline in performance since your last evaluation". (Court of Appeals Record R3-36-Exhibit B, App. E) Notwithstanding his Evaluation, Bryan Smith was hired as an Advanced Patrol Officer with Chatham County Police Department.

Bryan Smith's subsequent actions with the Chatham County Police Department and actions permitted by its other Police Officers, leading up to the automobile collision with Urban M. Krippene, show that this Department had a policy of failing to take remedial steps to correct Constitutionally offensive acts by County Police employees, including Officer Smith, which would infer deliberate indifference and tacit authorization of the offensive acts by Chatham County and by Officer Smith. Smith's known and permitted habitual actions that include Constitutionally offensive acts, as set out in his Termination Letter (App. D), were:

June 29, 1991: Inability to follow instructions and complete report. July 2, 1991: Attempted rape by Smith. July 9, 1991: Failure to service police unit. July 22, 1991: Smith domestic dispute. July 23, 1991: No work performance improvement. August 10, 1991: **At fault motor vehicle collision resulting from Unsafe Driving Techniques.** August 23, 1991: Bad progress report. September 4, 1991: **Violation of automobile pursuit policy.** September 20, 1991: Harassing citizen on September 11 and 13, 1991, while driving police vehicle. October 24, 1991: Overall poor work performance.

October 24, 1991: Slow response to Calls. November 7, 1991: Nasty and prejudiced complaint. January 29, 1992: **Automobile accident.** February 27, 1992: Disregarding orders. April 20, 1992: **Automobile accident, driving 83 miles per hour.** May 12, 1992: **Speeding 30 mph over speed limit twice within 45 minutes.** May 22, 1992: **Recommendation of additional two weeks denial of take home privileges and if any more accidents Smith be terminated because of negative retention problem.** July 2, 1992: Poor work performance. September 27, 1992: Slow Call response. October 20, 1992: Rude and disrespectful. January, 1993: Damage to Unit. February 14, 1993: Making traffic stops in route to Call. February 15, 1993: Sick leave abuse. March 9, 1993: Late for work. May 30, 1993: Out of uniform, not responding to duty. August 6, 1993: Unfamiliar with divisions and streets. September 26, 1993: **Automobile accident.** January 8, 1994: **Automobile accident.** July 9, 1994: AWOL from Duty.

Krippene fatality

Petitioner contends, with regard to Police Officer Bryan Smith, that under the egregious circumstances presented in this Case, Bryan Smith's arbitrarily driving his Police vehicle in excess of 70 mph at the time of the Krippene collision amounted to an abuse of his Police authority in a manner that shocks the conscience, a propensity about which the Respondents had prior notice with deliberate indifference, rose to the level of a Constitutional deprivation of the rights of the late Urban M. Krippene.

Accident Reconstructionist Corporal Scott Simpkins found Smith at fault. (Court of Appeals Record R3-36-Exhibit H, pp.25, 57, App. F) Chief Ronald Lowe opined in deposition that, prior to the Krippene wreck, Bryan Smith's Personnel File showed an existence of a habitual pattern of reckless conduct involving Police vehicles that put citizens of Chatham County in danger. (Court of Appeals Record R3-36-Exhibit J, pp.95-104, App. G) Officer Harvey J. Lowery by deposition testified that in January 1993 he reported to Maj. William Freeman, the Patrol Commander, that Bryan Smith had a history of bad driving habits.

Chief Lowe admitted in deposition that the corrective action taken against Officer Smith by the Chatham County Policymakers did not seem to work; that different discipline should have been implemented; that Smith's deficiencies showed a pattern in his operation of Police vehicles; that Police Officers owed a duty to the general motoring public in the safe operation their Police vehicles; that he was surprised at the manner in which Officer Smith had been disciplined; that Major Freeman and prior Chief St. Lawrence, who were policy makers, were aware of the problems that Officer Smith was exhibiting in operating Police vehicles, according to the Personnel File, prior to the Krippene fatality; that Smith should have been trained more thoroughly or "gotten rid of"; and that other Police Officers on the Chatham County Police Force had demonstrated a pattern of reckless disregard of public safety on the highways and streets such as demonstrated

by Officer Bryan Smith. (Court of Appeals Record R3-36-Exhibit J, pp.36, 37, 39, 44, 45, 56, 79, 81, 115, App. H)

Preferential treatment of Police Officers

Corporal Peter L. Leopold testified in deposition that during the period Officer Smith was employed at the Chatham County Police Department there was not consistency in administering discipline to Officers in their operation of Chatham County vehicles. (Court of Appeals Record R3-36-Exhibit L, pp.12-15, App. I)

Corporal Neal Owens testified in deposition that a policy existed within the Chatham County Police Department not to issue Speeding Tickets to Police Officers while operating Police vehicles when not responding to a Call and that it was the Police Department's policy to allow Police Officers, when not responding to a Call, to exceed the speed limit in violation of State Law. (Court of Appeals Record R3-36-Exhibit G, pp.9-14, 21, 22, App. J)

Awareness of Policymakers

The depositions of Major William Freeman, former Chief Ronald Lowe, and former Chief Al St. Lawrence, show that each of these three Policymakers, prior to the Krippene fatality, were also made aware of Officer Smith's history of habitual reckless driving while operating Police vehicles that also involved prior speeding with a wreck. (Court of Appeals Record R3-36-Exhibit M, pp.50, 51, App. K and R3-36-Exhibit J, p.78, App. L, and R3-

36-Exhibit N, pp.30-31, App. M)

Major Freeman had notified Acting Chief Davin in a written Memo of May 12, 1992 produced during discovery that the County was dealing with a "negligent retention problem" with Bryan Smith due to his number of car wrecks. (Court of Appeals Record R3-36-Exhibit M, pp.46, 47, App. N)

This pattern not only caused property damage and personal injury prior to the Krippene fatality, but also showed a conscious disregard by the Policymakers of Chatham County of deliberately failing to take remedial steps to correct the Constitutional offensive acts by Chatham County Police Department which were foreseeable as a cause of injury to citizens of Chatham County.

The Expert Witness Report of Daniel S. Ray, an expert who has over 25 years experience in law enforcement and who had served as Senior Agent-In-Charge of Regional Aid for the Georgia Peace Officer's Standard and Training Counsel, a State Licensing Authority for the State of Georgia for all Peace Officers, including Chatham County Police Officers, established by discovery that Chatham County Police Department adopted, adhered to and ratified inappropriate actions by its Police Officers, and had created a policy of not properly training, re-training, disciplining and terminating Officer Bryan Smith and of having allowed Officer Smith to continue to inappropriately and unsafely operate Chatham County Police vehicles, which

created a danger to the motoring public prior to November 18, 1994. (Court of Appeals Record R3-36-Exhibit O, App. O)

Awareness of Police Officer

The history of the "reprehensible" conduct of Chatham County Police Officer Bryan Smith, as characterized by the District Judge in the April 16, 1997 Order, at p.3, as well as the fact that Smith must have known that he was placing citizens of Chatham County, who on November 18, 1994 unfortunately happened to be Urban M. Krippene, in great danger by his unnecessary operation of a Police vehicle at an extremely high speed. Any reasonable Police Officer charged with enforcing speed limits would have known of this danger. No reasonable Police Officer could have believed such conduct was completely immuned from liability. Any reasonable Officer in Smith's circumstances would have been aware that if his conduct was sufficiently egregious and would result in either injury or death to a citizen who had the misfortune of being on the same roadway with him, he would be held liable for such injury or death. *Cf. Lewis v. Sacramento County*, 98 F.3d 434, at 445 [15].

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT ORDER IS DISTINGUISHED FROM AND CONFLICTS WITH THIS COURT'S PRIOR RULINGS AND PRIOR RULINGS OF OTHER CIRCUITS ON A CONSTITUTIONAL DEPRIVATION AND RIGHT TO RELIEF UNDER 42 USC SECTION 1983 RESULTING FROM A CUSTOM

OR POLICY AND ARBITRARY AND DELIBERATE INDIFFERENCE REGARDING THE KNOWN INTENTIONAL AND ARBITRARY CONDUCT OF COUNTY POLICE OFFICERS AND FROM THE KNOWN INTENTIONAL AND ARBITRARY CONDUCT OF A COUNTY POLICE OFFICER WHO ABUSED HIS GOVERNMENTAL POWER IN A MANNER THAT SHOCKS THE CONSCIENCE.

This Argument on the Issues preliminarily addresses the merit of these Issues and why they are worthy of Certiorari consideration.

The Issues worthy of Certiorari consideration because the Court of Appeals Panel Decision, based on *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996), made without comment as to the specific applications of that Case to this Case, does not control the facts of the Case *sub judice* as applied to the relevant law, and since a proper application of the recent Decision of the Supreme Court of the United States in *Board of County Commissioners of Bryan County, Oklahoma v. Jill Brown*, 117 S.Ct. 1382, 137 L.Ed.2d 626, __U.S.__, decided April 28, 1997, and the proper interpretation of the precedent of the 11th Circuit in *Rooney, supra*, distinguished from this Case under consideration, would secure and maintain uniformity of Decisions in the Circuit Courts.

Further, the decisions of other Circuits, including the 3rd Circuit and the 4th Circuit, are split on the issue of liability under Section 1983 and the Fourteenth Amendment with respect to a Municipality failing to train and

supervise Police Officers' high speed use of their vehicles as applied to Federal rights. (District Court Order, p.4, FN 3, App. B)

The Respondents contended that the Petitioner could not establish a Constitutional deprivation supporting relief sought under Section 1983 and, even if so, Chatham County had no custom or policy of failing train, re-train and adequately discipline its Police officers. The Respondents, as does the District Court, and now the Circuit Court panel, rely on a version of the recent Decision of the 11th Circuit in *Rooney v. Watson, supra*.

The District Court in its Order granting Summary Judgment, in the view of this Petitioner, failed to give proper attention to the Policymakers of Chatham County Police Department continuing to allow misconduct on the part of its Police Officers that included Officer Smith.

It was not just Bryan Smith's negligent driving at the time of the collision with Mr. Krippene that took his life, but overall it was the established custom and policy of the Police Department with regard to the pattern of reckless disregard for the public safety on the highways of Chatham County by its Police Officers and Officer Smith that translated to this same pattern of reckless disregard for the public safety on the highways of Chatham County by the Chatham County Police Department, coupled with Bryan Smith's abuse of his governmental power in a manner that shocks the conscience at the

time of his collision with Mr. Krippene. Generally, the relevant law in this regard, properly applied, is clear, as stated in *Rooney v. Watson, supra, citing Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986).

The conduct of both the Chatham County Police Department and its Police Officers, that included Police Officer Bryan Smith, however was more than just a failure to properly train Officer Smith as required under *Collins v. Harker Heights*, 503 U.S. 115, 122-123 (1992) involving a high-speed police pursuit, since the egregious conduct in this Case falls between the arbitrary employment of power as an instrument of oppression in an abusive manner that resulted from what would be considered deliberate indifference to the protection of the lives of persons using the highways and the arbitrary and deliberate indifference on the part of both the Police Department and Officer Smith that shocks the conscience, as extensively addressed in *Lewis, et al, etc. v. Sacramento, County, et al*, 98 F.3d 434, now being considered by this Supreme Court on Petition for a Writ of Certiorari.

The 11th Circuit Court in *Cannon, supra*, held in *Division* [3], at p.950, analyzing the decision by the Supreme Court of the United States in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a Municipality "would be liable for a policy that causes a citizen to be subjected to a deprivation of a constitutional right". *Citing*:

Grandstaff v. City of Borger, 767 F.2d 161, 169 (5th Cir. 1985). This decision then went on to state: "The policy may be a governmental 'custom' which has not received formal approval through the Official decision-making channel. A custom is a practice so settled and permanent that it takes on the force of law. *Monell*, 436 U.S. at 690-91, 98 S.Ct. at 2035-36".

The 11th Circuit, in reviewing *Rooney*, then addressed the reasoning made by that Circuit in their *Cannon v. Taylor* decision. A distinction was made in the *Cannon* decision between negligent or even grossly negligent operation of a vehicle by a policeman acting in the line of duty, that does not give rise to a cause of action for violation of a Federal Right under Section 1983, and the *Standard* for when Federal Courts may impose Section 1983 Municipal liability for a "policy" of failure to take steps to correct Constitutionally offensive acts by Municipal employees. *Cannon* at p.951.

The focus of the Petitioner's claim against Chatham County is for their improper inaction after notice of misconduct by its Police Officers and their deliberate toleration of this misconduct by its Police Officers and of Officer Smith's abusive conduct by his intentional misuse of his vehicle, as held in *Chicki v. Webb*, 785 F.2d 534, at 538 (5th Cir. 1986) *cited* in *Lewis v. Sacramento County, supra*, about which Chatham County also had prior notice of the possibility of harm that could be caused by his conduct, as being the party

responsible who may be sued directly for Official capacity actions of its employees, under *Monell, supra*, 436 U.S. at 690 n.55, 98 S.Ct. at 2035 n.55, 56 L.Ed.2d 61, for such misconduct by its Police Officers while indisputably acting under the color of State law. Chatham County and Officer Smith not only abused their power as an instrument of oppression in a manner that constituted arbitrary and deliberate indifference to placing the lives of citizens in jeopardy, but both were arbitrarily and deliberately indifferent to and callously disregarded the rights of citizens to be secure in and not deprived of their life, which shocks the conscience. As stated, Smith had to have reasonably known of this danger. *Cf. Lewis, supra*, 98 F.3d, at p.445.

In *Cannon*, the 11th Circuit did affirm the District Court's granting of Summary Judgment to the City of Columbus and their Officer. However, the analysis regarding the claim against individual Police Officers in *Cannon* is not applicable to this Case. It is *Division* [3] of the *Cannon* decision that should be addressed in relation to the facts of the present Case.

The United States Supreme Court has just addressed, once again, the problem of what would constitute a Section 1983 Municipal Liability for improper actions of its Police Officers, in *Board of County Commissioners of Bryan County, Oklahoma v. Jill Brown, supra*.

The *Brown* opinion turned on the County not being liable for a Sheriff's

isolated decision to hire a Deputy without adequate screening, because it had not been demonstrated that the "hiring decision reflected a conscious disregard for the high risk" that the hired Deputy would use excessive force, in violation of a Federally protected right. *Id.* pp.4-6. The facts and the application of the controlling law in the *Brown* opinion are patently different from the facts and the application of the controlling law in the Case *sub judice*; but for the notable fact, as to Bryan Smith, that in the present Case the continuing decisions by Chatham County to keep Officer Smith did reflect a conscious and arbitrary disregard for the high risk (*i.e.* the acknowledged "negligent retention" problem) that Officer Smith would injure someone while he was improperly and arbitrarily using his Police vehicle. Again, Officer Smith, himself, had to have reasonably known of this danger. *Cf. Lewis, supra*, 98 F.3d, at p.445.

It is clear from the review of Officer Bryan Smith's Personnel File, that there was a practice that became a custom with regard to Officer Smith's discipline, as in the case of all other speeding Police Officers by the Chatham County Police Department. Officer Smith was simply allowed to continually operate his vehicle in an arbitrary manner that had no significant repercussions to him, regardless of his habitual reckless driving. Further, it was established by Corp. Leopold, that the policy regarding discipline for reckless driving of Police vehicles was inconsistent at the Chatham County Police Department.

Corp. Neal Owens further established that all Police Officers were allowed to speed while not responding to a Police Call, even though they are subject to the State Motor Vehicle Laws, without any written Speeding Tickets being issued. Corp. Owens testified he was instructed by his Supervisors not to issue Tickets to Police Officers. It should be remembered that at the time of Officer Smith's at-fault wreck of April 20, 1992, he was driving the Police vehicle at a speed of 83 mph and that he also did not receive a Citation for speeding at that time.

In *Rooney v. Watson, supra*, the Court did not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training, since it determined that Deputy Watson's conduct did not cause the Rooney's to suffer a Constitutional deprivation. In the instant Case it also must be recalled that it was the arbitrary conduct of both the Chatham County Police Department and Officer Smith, as demonstrated by the policy and custom relating to the arbitrary operation of Police vehicles in violation of State Law and the arbitrary operation of a Police vehicle by Officer Smith, that caused Mr. Krippene to suffer a Constitutional deprivation. The *Rooney* decision did not address the liability of the County with regard to Constitutional deprivation.

In the Concurring Opinion in *Rooney*, Circuit Judge Anderson specifically pointed out that the plaintiffs' evidence there about speeding was "vague and unhelpful" and thus could not constitute

the basis of liability on the County's part for a Constitutional violation. There is no such vagueness in the Case *sub judice*. In view of the evidence proffered by the plaintiffs in the *Rooney* Summary Judgment Record, Judge Anderson readily concluded that the plaintiffs there had failed to show that Volusia County was deliberately indifferent in a manner that could have caused the accident. This, as stated, is an important point in relation to the Record in the present Case. Chatham County constantly and consistently failed to properly discipline Officer Smith in relation to his habitual driving pattern, especially in regard to his arbitrary speeding, and also allowed such arbitrary speeding by other Officers.

In addition, the Court in *Rooney, supra*, established in *Divisions* [3][4], at p.1381, the proposition that inquiry into a Governmental custom or policy is relevant when a Constitutional deprivation has been shown to have occurred as a result of that custom or policy that, in itself, amounted to a Constitutional deprivation (as shown in the Case *sub judice*). *Citing, Vineyard v. County of Murray, Georgia*, 990 F.2d 1207, 1211 (11th Cir.), *cert. denied*, 510 U.S. 1024, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993) [FN3]. Therein lies the distinction. *Also See Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) (*en banc*), where the County was held responsible for its Sheriff routinely letting an inmate, who had a history of pulling over motorists, drive a Patrol Car to run errands. Although the *Gross Negligence Standard* no longer applies in the 6th Circuit under

Foy v. City of Berea, 58 F.3d 227, 230 (6th Cir. 1995), the 6th Circuit adopted the *Deliberate Indifference Standard* to be applied to substantive Due Process violations alleged under Section 1983. *Id.* 232 [5], *citing DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, at 198-199 n.5, 109 U.S. at 1005 n.5. Again, it should be noted that there is a broad spectrum ranging throughout the various Circuits regarding Official conduct that constitutes a Section 1983 Due Process violation. *See, e.g. Lewis v. Sacramento County*, 98 F.3d at 439 n.5.

The Petitioner, under the foregoing established facts, has demonstrated that a custom or policy and the deliberate indifference of Chatham County caused a deprivation of Mr. Krippene's Constitutional rights, as required under *Canton v. Harris*, 489 U.S. 378, 385 (1989) (cited in *Rooney, supra*, at p.1380).

The "link" required in *Hill v. DeKalb*, 40 F.3d 1176, 1195 (11th Cir. 1994), between the causative actions of the Chatham County Police Department and the consequential injury sustained and death of the late Urban Krippene, is unmistakably plain and conspicuous. The requisite causal connection was the custom of the Police Department that arbitrarily allowed its Police Officers to arbitrarily speed at will with this permissiveness and the deliberate indifference of the Chatham County Police Department being the "moving force" in the death of Mr. Krippene, as required in *Canton*, at 389, 109 S.Ct. at 1205, quoting *Monell* at 694, 98 S.Ct. at 2038, *cited* in *Lewis v. Sacramento County*,

at 646 [18,19] *Also See Generally*: District Court Order, pp.4, 5, App. B.

The Supreme Court in *Brown, supra*, at p.7, citing from *Canton, supra*, stated that "continued adherence to an approach that [a municipal decision-maker] know[s] or should [have] know[n] has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action, the 'deliberate indifference' ... necessary to trigger municipal liability." *Id.* at p.390, n.10. The Supreme Court in *Brown, supra*, continued by also stating that the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a *one-time* negligent administration of the program or factors particular to the Officer involved in a particular incident, is the "moving force" behind the injury sustained by Petitioner's decedent. *See also Canton*, at pp.390-391.

CONCLUSION

This Case presents a question of exceptional importance concerning whether a litigant is entitled to relief under Section 1983 when a Police Department by custom or usage arbitrarily and with deliberate indifference causes a citizen to be subjected to the deprivation of a right secured by the Constitution and Laws by one of its Police Officers knowingly placing citizens in great physical danger.

Should the Opinion below be allowed to stand, Nancy Kimball Krippene and the

Estate of her deceased husband Urban M. Krippene will have been denied Due Process and will forever suffer the consequences of a decision that incorrectly applies prior Rulings of this Court and of the Circuit Courts of Appeal.

By granting this Petition for Certiorari this Court can correct the 11th Circuit's *Per Curiam* Opinion which incorrectly applies not only its own prior Rulings but which is contrary to this Court's prior Holding that a litigant has a Due Process right to relief under Section 1983 when a State authority by custom or usage arbitrarily and with deliberate indifference causes a citizen to be subjected to the deprivation of a right secured by the 14th Amendment to the Constitution and Laws, and that Section 1983 can be used to effectuate this right.

The granting of this Petition will also establish uniformity among the Circuits now split on the Issue of Section 1983 liability for failure to train and supervise Police Officers with regard to the nation-wide, judicially known problem of unnecessary high-speed operations of Police vehicles that will deter such "unlawful actions by public officials and compensat[e] victims of such conduct." *Elder v. Holloway*, 510 U.S. 510, 511, 114 S.Ct. 1019, at 1020, 127 L.Ed.2d 344 (1994).

In so doing, this Court can also reaffirm the limitations imposed on a District Court Judge to issue Summary Judgments in Section 1983 cases under Federal Rules of Civil Procedure, Rule 56,

that would allow a litigant to have a jury determine in an action at Law whether there is liability to a party injured by reason of a violation of Section 1983.

ACCORDINGLY, this Petitioner respectfully requests that her Petition for a Writ of Certiorari be granted.

Respectfully submitted:

JOSEPH B. BERGEN
Counsel of Record

JOSEPH B. BERGEN
Ga. State Bar No. 054200
D.C. Bar No. 428804
and
FREDERICK S. BERGEN
Ga. State Bar No. 054160
123 East Charlton Street
Savannah, Georgia 31401
(912) 233-6600

Attorneys for Petitioner

APPENDIX A — *PER CURIAM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 1, 1997

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8493

D.C. Docket No. CV496-211

NANCY KIMBALL KRIPPENE, Individually, and as the Executrix of the Estate of Urban M. KRIPPENE, deceased,

Plaintiff-Appellant,

versus

RONALD LOWE, SR., Individually and as Chief of Police of Chatham County Police Department,

Defendant,

THE BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, CHATHAM COUNTY, GA.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(December 1, 1997)

Appendix A

Before BLACK and BARKETT, Circuit Judges, and PROPST*, Senior District Judge.

PER CURIAM:

AFFIRMED. *See Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996).

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* Hon. Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED APRIL 16, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CASE NUMBER: CV496-211

NANCY KIMBALL KRIPPENE

v.

BOARD OF COMMISSIONERS OF CHATHAM
CHATHAM COUNTY, ET AL

JUDGMENT IN A CIVIL CASE

* * *

☒ This action came ~~to that of hearing~~ before the Court. The issues have been ~~tried or heard~~ considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the decision rendered on the 16th day of April 1997 granting defendants motion for summary; judgment is hereby entered dismissing complaint with prejudice.

April 16, 1997
Date

Henry R. Crumley, Jr.
Clerk

s/ Nicole M. Thomas
(By) Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV 496-211

NANCY KIMBALL KRIPPENE, Individually, and as the Executrix of the Estate of URBAN M. KRIPPENE, deceased,

Plaintiff,

v.

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA and CHATHAM COUNTY, GEORGIA, Political Subdivisions of the State of Georgia,[1]

Defendants.

ORDER

I. Background

In November 1994, Chatham County Police Officer Bryan D. Smith was driving his police vehicle to work at an unjustifiably high rate of speed when he collided with Urban M. Krippene ("Urban"), who died as a result. Defts' Material Facts Not in Dispute (doc. # 27) ¶ 28; Pltf's Statement of Material Facts (doc. #37) ¶ 28. Plaintiff Nancy Kimball Krippene, Urban's wife, thereafter instituted this 42 U.S.C.

1. This caption reflects the fact that a 3/17/97 Consent Order dropped Defendant Ronald Lowe, Sr. as a party to this action.

§ 1983 action against Defendants (collectively "Chatham County" or "the County"), alleging that the County's "custom or policy" of failing to train, re-train and adequately discipline Smith in light of his lengthy record of official misconduct — much of it driving-related — proximately caused her husband's death. She also raises a wrongful death claim under Georgia law.

Defendants have moved for summary judgment, contending that (i) Krippene cannot establish a constitutional deprivation supporting relief under § 1983; and (ii) even if she could, the evidence shows that the County had no "custom or policy" of the sort alleged. Plaintiff has timely opposed the motion.

II. Analysis[2]

§ 1983 "provides a remedy against 'any person' who, under color of state law, deprives another or rights protected by the Constitution." *Collins v. City of Harker Heights, Tx.*, 503 U.S. 115, 120 (1992). Although Chatham County is a "person" for § 1983 purposes, *see id.*, it cannot be held vicariously liable for Smith's behavior; rather, it is only liable for its own wrongdoing. *Id.* at 122.

A municipality's custom or policy of failing to adequately train its employees can give rise to a constitutional violation, but only if such failure amounts to "deliberate indifference" to the "rights of persons with whom the police come into contact." *Id.* at 123-24. Absent a deprivation of constitutional dimension,

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2. This Court applies the summary judgment principles exhaustively detailed in *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993) and *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742-43 (11th Cir. 1996).

however, any failure to train, re-train, supervise or discipline is of no consequence, since § 1983 is not implicated. *See id.* at 124-30; *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996) ("an inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred"); *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211-1212 (11th Cir.), *cert. denied*, 510 U.S. 1024 (1993) ("Only when it is clear that a violation of specific rights has occurred can the question of § 1983 municipal liability for the injury arise"); *Lyle v. Dodd*, 857 F. Supp. 958, 967 (M.D.Ga. 1994).

The uncontroverted evidence in this case shows that when he collided with Urban, Smith was driving at a high rate of speed in a "non-emergency" and "non-pursuit" situation. *Rooney*, 101 F.3d at 1181. While reprehensible, Smith's actions do not elevate what is essentially "a state tort claim" into something more; a person injured by a policeman's grossly negligent operation of a motor vehicle " 'has no section 1983 cause of action for violation of a federal right.' " *Id.* (quoting *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986)).

In an effort to surmount this considerable hurdle, Krippene attempts to distinguish *Rooney*:

> In *Rooney*, the [panel] did not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training, since it determined that Deputy Watson's conduct did not cause the [plaintiffs] to suffer [a] [c]onstitutional deprivation. In the instant [c]ase[,] it must be remembered that the Plaintiff[ ] do[es] not allege [ ] that it was Officer Smith's conduct that caused Mr. Krippene to suffer [a] [c]onstitutional deprivation, but rather it was

Appendix B

> Chatham County's conduct, as demonstrated by [its] policy and custom relating to operation of patrol vehicles in violation of State law, that caused Mr. Krippene to suffer a [c]onstitutional deprivation. The *Rooney* decision did not even address the liability of the County with regard to [a] [c]onstitutional deprivation.

Pltf's Reply to Mot. for Summary Judgment (doc. # 36) at 13. As discussed earlier, the absence of a constitutional violation renders any inquiry into "custom or policy" superfluous. The *Rooney* panel did not address Volusia County's liability because it had already found that the defendant officer did not impinge upon the plaintiffs' federal rights.[3]

Krippene additionally implies that the omission of Smith as a name Defendant somehow makes her case different from *Rooney*. Yet, in attempting to hold Chatham County liable, she cannot — contrary to her suggestions — turn a blind eye to Smith's conduct; in fact, without his actions, she has no standing to sue. "[T]he statutory language of § 1983 necessitates proof of an affirmative casual connection between the actions taken

3. While the Eleventh Circuit has spoken definitively on this point, other circuits have split on the issue. *Compare Fagan v. City of Vineland*, 22 F.3d 1282, 1293-94 (3d Cir. 1994) ("We hold that a municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution"), *with Temkin v. Frederick County Commissioners*, 945 F.2d 716, 724 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) ("A claim of inadequate training under section 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation on the part of the person being supervised").

under color of state law and the constitutional deprivation." *Gay v. City of Daleville*, 953 F. Supp. 131, 1332 (M.D.Ala. 1996). Indeed, even if a municipality adheres to a deplorable custom or policy, § 1983 does not provide a means of redress unless the plaintiff can also establish the requisite casual link. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations have *authorized* the use of constitutionally excessive force is quite beside the point") (emphasis in original); *Vineyard*, 990 F.2d at 1213 ("The existence of an official policy [alone] is insufficient to impose [§ 1983] liability on the county," as plaintiff "must also show that the policy was the moving force of the constitutional violation"); *Thompson v. Boggs*, 33 F.3d 847, 859 n.7 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1692 (1995). Given that Krippene lacks a constitutional peg on which to hang her § 1983 hat, she cannot satisfy this element of causation. Defendants, therefore, are entitled to summary judgment.

As Plaintiff well recognizes, *see* doc. # 36 at 24, "[t]he decision of whether to dismiss a complaint still containing state law issues after all federal causes evaporate is within the district court's sound discretion." *Flint Elec. Membership Corp. v. Whitworth*, 68 F.3d 1309, 1314 (11th Cir. 1995), *modified on other grounds*, 77 F.3d 1321 (11th Cir. 1996); *see also* 28 U.S.C. § 1367(c). In Georgia, the statute of limitations for a wrongful death action is two years. *See Gray v. Armstrong*, 474 S.E.2d 280, 281 (Ga. App. 1996); *Burns v. Radiology Assocs. of Gwinnett, P.C.*, 446 S.E.2d 76, 77 (Ga. App. 1994). By filing the instant matter in August 1996, Krippene beat the limitations clock by at least two months and tolled that period to boot. *See* 28 U.S.C. § 1367(d), *U.S. Anchor Mfg., Inc. v.*

Rule Industries, Inc., 7 F.3d 986, 1005 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994) ("Under 28 U S.C. § 1367(d), the statute of limitations would be tolled while the claims were pending until 30 days after an order of dismissal, thus allowing the plaintiff time for filing a new action in state court without a lapse of its rights"); *Edwards v. Okaloosa County*, 5 F.3d 1431, 1433 n.1 (11th Cir. 1993), *modified on other grounds*, 12 F.3d 358 (11th Cir. 1994); *Linder v. Richmond County, Ga.*, 844 F. Supp. 764, 769 (S.D.Ga.), *aff'd*, 38 F.3d 574 (11th Cir. 1994). Because she will not suffer prejudice form the dismissal of her remaining claim, the Court so exercises its discretion.

III. Conclusion

Accordingly, Defendants' motion for summary judgment (doc. # 25) is **GRANTED.** Plaintiff Nancy Kimball Krippene's complaint is **DISMISSED WITH PREJUDICE**.

SO ORDERED, this 16th day of April, 1997

s/ B. Avant Edenfield
B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — DENIAL OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC FILED FEBRUARY 23, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8493

NANCY KIMBALL KRIPPENE, individually, and as Executrix of the Estate of URBAN M. KRIPPENE, deceased,

Plaintiff-Appellant,

versus

RONALD LOWE, SR., Individually and as Chief of Police of Chatham County Police Department,

Defendant,

THE BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, CHATHAM COUNTY, GA.

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Appendix C

Before: BLACK and BARKETT, Circuit Judges, and PROPST**, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible] Barkett
UNITED STATES CIRCUIT JUDGE

** Hon. Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX D — BRYAN SMITH TERMINATION LETTER

CHATHAM COUNTY POLICE DEPARTMENT
7606 HODGSON MEMORIAL DRIVE
SAVANNAH, GEORGIA 31406

RONALD LOWE, SR.
CHIEF OF POLICE
TELEPHONE (912) 652-6500

January 12, 1995

Apo. B. D. Smith
126 Neva Bluff Drive
Savannah, Georgia 31406

Dear Apo. Smith:

This letter will serve as an official written notification of my decision to recommend, and the County Manager's approval, to dismiss you from employment from the Chatham County Police Department effective immediately. The decision to terminate your employment is based on your violation of S.O.P. #10-040 and for violation of the Chatham county Personnel Ordinance Section III-108.2. I refer specifically to an incident which occurred on November 18, 1994, while you were enroute to work in your police unit, you were involved in an automobile accident. An Internal Affairs Investigation of this accident revealed that at the time of impact you [sic] traveling at a high rate of speed. This action is a direct violation of Department Policy.

Since your transfer from the Chatham County Sheriff's Department to the Chatham County Police Department on

Appendix D

April 13, 1991, your personnel record is laden with repeated incidents of poor judgement, negligence and failure to follow departmental policy as noted below:

June 29, 1991	Inability to follow instructions and complete reports. Disposition, oral reprimand. Told to improve, if not would be terminated.
July 9, 1991	Ofc. Smith received oral reprimand because he failed to have his police unit serviced.
August 10, 1991	Ofc. Smith is involved in an auto accident, contributing factor failure to yield. Ofc. Smith is at fault, disciplinary action, three (3) days take home privileges revoked.
August 23, 1991	Bad progress report. Disposition, counseled.
September 4, 1991	Pursuit policy, auto chases. Disposition, counseled.
September 13, 1991	Harassment complaint, handled by Internal Affairs. Disposition, none.
October 24, 1991	Overall work performance. Disposition, counseled.
October 24, 1991	Slow response to calls. Disposition, counseled.

Appendix D

November 7, 1991	Complaint, nasty & prejudiced. No disposition. Sick for regular duty. Disposition, oral reprimand.
January 29, 1992	Involved in auto accident at Skidaway Road near Ferguson Avenue, code three (3) call. Disposition, no violation of Department rules, no action taken.
February 7, 1992	Completed Basic Emergency Vehicle Operation Course.
February 27, 1992	Disregarding orders. Disposition, oral reprimand.
April 20, 1992	Involved in auto accident. Struck another vehicle in the rear. Contributing factor: following too close. Disciplinary action, 14 days take home privileges revoked, civil action pending.
May 12, 1992	Speeding in police unit, clocked on radar twice within 45 minutes. Each time approximately 30 miles per hour over posted speed limit. Disciplinary action, 30 days take home privileges revoked.
May 22, 1992	Due to military leave and take home privileges being revoked, it was recommended that an additional two weeks be added to take home privileges and that if there be any more accidents, Ofc. Smith be terminated. It appears that we are dealing with a negative retention problem.

Appendix D

July 2, 1992	Poor work performance. Disposition, counseled.
September 27, 1992	Slow response to calls. Disposition, counseled.
October 20, 1992	Complaint, rude and disrespectful. Disposition, oral reprimand.
January, 1993	Engine damage to unit 908, drive vehicle into high water. At briefing all troops were reminded to use caution due to high water in areas. Disciplinary action, 180 days take home privileges revoked.
February 14, 1993	Making traffic stops while enroute to assigned call. Disposition, counseled.
February 15, 1993	Sick leave abuse. Disposition, none.
March 9, 1993	Late for work complaint. Disposition, written reprimand.
May 30, 1993	Out of uniform, not responding to duty. Disposition, written reprimand.
August 6, 1993	Unfamiliar with divisions and street. Disposition, counseled and told that recurrence would result in disciplinary action.
September 26, 1993	Auto accident, Spanky's parking lot in Pooler. No disposition.

Appendix D

January 8, 1994 — Auto accident Krystal's parking lot, Garden City. No disposition.

Your actions show a pattern of reckless disregard for public safety on the highways of Chatham County. This is not only a violation of Departmental Policy forbidding county Police units from traveling at a rate of speed greater than the posted speed, but also a violation of the County Personnel Ordinance requiring persons who operate County vehicles to do so following the principles of defensive driving and advising the possible penalty for unsafe or unlawful operation. Your actions greatly endangered yourself and resulted in the death of a citizen.

Because you are a full-time regular employee of Chatham County, you have the right to appeal this decision to the Personnel Advisory Board within ten (10) days after receipt of this letter. Any appeal must be forwarded through the Human Resources Director.

Sincerely,

s/ Ronald Lowe, Sr.
Ronald Lowe, Sr.
Chief of Police

RL/CSH/seh

cc: R.E. Abolt, County Manager
Beverly M. Whitehead, Human Resources
Personnel File

APPENDIX E — TWO YEAR PERFORMANCE EVALUATION BY THE CHATHAM COUNTY SHERIFFS' DEPARTMENT

INTER-OFFICE CORRESPONDENCE

DATE: March 19, 1991

TO: Deputy Bryan Smith

FROM: Undersheriff Donald E. Anderson

SUBJECT: Performance Evaluation

Your two (2) year evaluation is totally unacceptable. Your supervisors, Lt. Powell, Sgt. Hood and Sgt. Cutchens agree that there has been an obvious decline in performance since your last evaluation.

Based on this information, I find it necessary to return you to probationary status for a period of three (3) months. This action is within the guidelines of our County Personnel Handbook, Section II-104-2g.

Your increase in pay and Private stripe received at the completion of two (2) successful years of service will be delayed until June 30, 1991. Your performance will be evaluated at the end of this period and a decision made as to your employment status.

cc: Sheriff Walter Mitchell, Jr.
Human Resources

APPENDIX F — DEPOSITION OF ACCIDENT RECONSTRUCTIONIST CORPORAL SCOTT SIMPKINS pp. 25, 57

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO. CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

vs.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA,

Defendants.

Deposition of SCOTT SIMPKINS, taken by counsel for Plaintiff, pursuant to agreement of counsel and notice, under the Federal Rules of Civil Procedure, reported by Jill M. Hesterlee, CCR, B-1658, in the offices of Assistant County Attorney, 124 Bull Street, Savannah, Georgia, February 19, 1997, commencing at 3:40 p.m.

* * *

Appendix F

[25] . . . Bryan Smith versus Chatham County?

A. Yes, sir.

Q. And do you recall in that deposition that you gave an opinion as to the speed being between 70 and 75?

A. I probably did.

Q. Okay.

A. I mean, I saw it on the other page there.

Q. Right, that's what I was going to ask you about.

A. And that's what I'm saying, it could be as high as 75 miles per hour. So I kind of — when I was writing the letter to the Chief —

Q. You had given kind of the benefit of the doubt, I guess?

A. I kind of hit it right in the middle, 65 but in excess of 65, and going this one here, I might have even zeroed in at 70 or 71 miles per hour would be a —

Q. You gave the opinion in excess of 70 but less than 75, and then you said between 70 and 75 and you said, that's my opinion?

A. Right.

* * *

Appendix F

[57] . . . findings were and let him make the call. The speed limit's 45. In my opinion, he was going greater than 65. And I just kind of wrote it and gave it to the Chief.

Q. Let the Chief make the determination?

A. Right.

Q. What was your determination?

A. He was in excess of the speed limit.

Q. Do you think he was at fault for the wreck?

A. Yes.

Q. That's all I have — when we're talking about he, we mean Bryan Smith?

A. Yes.

MR. BERGEN: That's all I have.

(Exhibits from Mr. Simpkins' previous deposition was marked as Exhibit Number 1.)

(Deposition concluded at 4:46 p.m.)

APPENDIX G — DEPOSITION OF CHIEF RONALD LOWE pp. 95–104

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NUMBER CV496-211

NANCY KIMBALL KRIPPENE, Individually and as the Executrix of the Estate of URBAN M. KRIPPENE, deceased

Plaintiff

vs.

RONALD LOWE, SR., Individually and as Chief of Police of Chatham County Police Department

and

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA

and

CHATHAM COUNTY, GEORGIA Political Subdivisions of the State of Georgia

Defendants

DEPOSITION OF
RONALD LOWE, SR.
January 22, 1997

Appendix G

* * *

[95] Identification)

A. (Examining).

Q. Exhibit 23 is the cover page of that manual.

A. Yes, cover page of the manual. Field Operations Manual, October 1, 1994. I think it's a half hour, judging by this.

Q. Where did you reference there, sir, so we can have what page of the manual.

A. Page 10 of 76.

Q. All right. Now I can take that back from you. Thank you, sir.

Officer Smith, according to your letter of January the 12th, 1995, had been late for work on March 9th of '93, for which he received a reprimand, according to your letter. Is that a fair statement?

A. Mm hmm. He, I believe, was on watch on the day of Mr. Krippene's fatality.

Q. Is that your recollection?

A. I'm not sure.

Q. Well, nonetheless, he was to be at work beginning at 3:00 o'clock that afternoon. Did you understand that to be correct?

A. Right.

Q. Are you familiar with the time of this wreck that occurred approximately around 2:30?

[96] A. I'm not sure of the time. I would have to see the accident.

Q. Here's the Accident Report. It's reported the time as being 1430 military time, which would be 2:30, correct?

A. That is correct.

Q. And the officer arrived at 2:33 that afternoon?

A. Right, 2:33.

Q. So, the time of the wreck, according to the policy Officer Smith should have already been at work, if he was to begin the 3:00 o'clock shift, correct?

A. That would be correct.

Q. So, he was already late at the time of this wreck?

A. I believe that was in the report.

Q. Did he ever explain to you that's why he was speeding, because he was late to work?

A. I'm not sure what his statement was.

(WHEREUPON, Lowe Exhibit Number 24
marked for identification.)

A. But he did give a statement.

Q. Do you recall him admitting that he, to Sergeant Thomas, that he was traveling 50 to 55 miles an [97] hour?

A. That's what Sergeant Thomas wrote, I believe.

Q. And that is contained in the Inter-Office correspondence we have marked as Exhibit Number 24, which is an Inter-Office correspondence to yourself from Sergeant A. F. Thomas. You recall receiving that, is that correct?

A. Yes, a copy of it.

Q. Now in your letter of, before you wrote your letter of January 12th, 1995, you had a full blown investigation in this matter, did you not, of the Krippene wreck?

A. Before what now?

Q. Before you wrote your letter of January 12th, 1995 terminating Mr. Smith, you had a thorough investigation?

A. We were not initiating a full blown, because it was not our jurisdiction. Savannah was doing the full blown investigation. I was doing an Internal Affairs investigation.

Q. And you relied on both of those investigations in your recommendation of termination of Bryan Smith, did you not?

A. I looked at information from both of them, yes.

[98] Q. And based on those investigations you made the determination that Bryan Smith was at fault for this collision, did you not?

A. No, I did not.

Q. Did you form an opinion?

A. On the information that I had received?

Q. Yes, sir.

A. I believe that it was due to speed.

Q. Which would be inappropriate action of Bryan Smith, would it not?

A. That's correct.

Q. And you said in your letter of January 12th, 1995, that "the decision to terminate your employment is based on your violation of S.O.P #10-040 and for violation of the Chatham County Personnel Ordinance Section III-108.2."

(WHEREUPON, Lowe Exhibit Number 25
Marked for Identification)

Handing you Exhibit Number 25, this deals with vehicle operation. You said in your letter you terminated him because he violated that policy and the County Personnel Ordinance III-108.2

Now which reference in the policy of S.O.P. #10-040 are you referencing? There are several subparts to [99] that.

A. D. Safe Driving of Police Vehicles.

Q. And you feel that based upon the information provided to you from the Internal Affairs investigation and from the city's investigation, that Bryan Smith violated that policy?

A. Right.

Q. Even though you say your decision to terminate him was based on the violation of S.O.P. #10-040 and the Personnel Ordinance, it's your testimony that you were terminating him because he had a habitual pattern of vehicle operation?

A. He was terminated because he violated that policy, which I used — what I perceived as a pattern of inappropriate behavior, unacceptable driving habits, unacceptable behavior as a policy officer, I used as a basis to use violation of standard operating procedures I did not fire him for all of these, I fired him for a collection of these, which culminated in violating S.O.P. #10-040.

The other Chatham County Personnel Ordinance deals with vehicle operations, and III–108.2 speaks for itself.

Q. Are you saying he violated both Paragraphs A and the B of that ordinance?

[100] (WHEREUPON, Lowe Exhibit Number 26 marked for identification.)

A. I said A.

Q. You didn't say in your letter "operating a county vehicle in an unsafe and unlawful manner may result in dismissal."

Appendix G

It is your testimony that based upon the Chatham County's Internal Affairs investigation, and the city's investigation, it was your belief that Mr. Smith, at the time of the Krippene accident, operated a county vehicle in an unsafe and unlawful manner?

A. It's my contention that because of this habitual, or this pattern, which shows poor judgment and all of these things, "you committed a violation against S.O.P. #10-040 as well as Personnel Ordinance EEE–108.2."

Q. So, you are saying that he violated those policies prior to the Krippene accident as well as with the Krippene accident?

A. I'm saying that these are the two specific charges he was charged with for the accident. My reason for firing him was listed below that.

Q. Well, I just want to make sure, I think we are on the same page here, but I just want to make sure that I'm clear on this in my mind.

[101] What you're telling me is that Mr. Smith, your review of Mr. Smith's record showed that he had habitually violated those policies?

A. Rules and regulations, right.

Q. The county policy ordinance and —

A. Not just these specific rules and regulations, but other —

Q. Okay, other ones?

A. — rules and regulations, which gave me a feeling that he was not cognizant of rules and regulations, as though they didn't apply to him.

Q. Okay, all right. As to the Krippene wreck, you would agree that he violated these particular, the ordinance that you referenced in your letter, as well as the S.O.P. #10–040?

A. Actually, those were the ordinances that were used, yes.

Q. With the Krippene wreck?

A. Yes.

Q. And you had also seen those, the S.O.P. and the Ordinance, Exhibits 25 and 26, being violated even before the Krippene accident once you reviewed the file in connection with the traffic —

A. Yes.

Q. And in looking at the file from '91, and all [102] the incidences involving Mr. Smith in the car, and not following orders and not adhering to rules and regulations, it appeared to be a failure to take remedial steps that were effective, by the Chatham County Police Department prior to your arrival?

MR. MAHONEY: I'll object to the form of that question. The witness has answered repeatedly that that would be speculative on his part, and he would have no way of giving you a meaningful answer to what was meaningful remedial

action at a time when he was not present and didn't know the circumstances.

Q. Well, did it appear to you that there was a failure to take remedial steps with Mr. Smith that were effective?

A. I don't know, counselor, what the remedial steps were that were taken. All I was basically saying to you is that in going through his jacket these violations and reports were in there. My experience has taught me that certain incidents that typically happen need to be addressed, if it's unacceptable behavior.

Now before I got here, or before I got there, I didn't question Davin, as he was the Acting Chief, what was done with Bryan Smith, because Bryan Smith did not come to my attention until he started getting discipline [103] for major offenses — minor offenses, no, I'm not going to go through a jacket and go back through somebody's history. If it's a major offense, then that should stick out like a sore thumb, because it's usually consistent. If it is not consistent, then you have a problem. This back here — not my problem.

Q. When you say "this back here," those are what you call major incidences were brought to at least the Major's level, and the Chief's before you arrived?

A. Well, that's what I'm saying. These are the people you need to talk to about that.

Q. Let me ask you this. From looking at the jacket, when you did look at it, don't you agree that this showed a pattern of similar incidences in which citizens could have been

endangered by the unacceptable police conduct of Bryan Smith in operating police vehicles?

A. Any policy, this policy and this policy, and even the policy here demands that — or exhibits that if these rules and regulations are not followed there is a possibility that someone could get hurt or killed.

Q. But isn't it true that from looking at — and you can explain anyway you want to — but it's either yes or no, and you can explain — in looking back at his jacket, and as a Chief, and from your experience, that [104] his personnel file showed a pattern of similar incidences in the operation of police vehicles in which citizens of Chatham County could have been either injured or endangered by the unacceptable conduct of Bryan Smith?

A. And I have answered that.

Q. Yes or no?

A. I said yes.

Q. Now in your letter you stated that "your actions showed a pattern of reckless disregard for public safety on the highways of Chatham County."

And that was your opinion on January 12th of '95, and still is today, is it not?

A. Yes, I still believe that.

Appendix G

Q. Now you further state, "this is not only a violation of the Departmental Policy forbidding County Police units from traveling at a rate of speed greater than the posted speed, but also a violation of the County Personnel Ordinance requiring persons who operate County vehicles to do so following the principles of defensive driving and advising the possible penalty for unsafe or unlawful operation."

So, that sentence you were specifically referring to the Krippene wreck, were you not? Or were you referring to Krippene and prior incidences?

A. This is directed to the wreck.

* * *

APPENDIX H — DEPOSITION OF CHIEF RONALD LOWE pp. 36, 37, 39, 44, 45, 56, 79, 81, 115

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NUMBER CV496-211

NANCY KIMBALL KRIPPENE, Individually and as the Executrix of the Estate of URBAN M. KRIPPENE, deceased

Plaintiff

vs.

RONALD LOWE, SR., Individually and as Chief of Police of Chatham County Police Department

and

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA

and

CHATHAM COUNTY, GEORGIA Political Subdivisions of the State of Georgia

Defendants

DEPOSITION OF
RONALD LOWE, SR.
January 22, 1997

Appendix H

* * *

[36] . . . would expect a Chief, that would have been reasonable for the Chief, any Chief, to do under the circumstances, to inquire?

A. Right.

Q. You mentioned something to me just a minute ago, that you want it proven to you. You wouldn't just take the piece of paper that's reported on, but you would want it proven to you that the Police Officer had a problem. I don't want to put words in your mouth, and I can't recall exactly what you said.

A. We're talking about, we are getting into those documents here.

Q. Right.

A. And what I am saying is — when you have performance — well, for documentation or a sheet of paper that says something is wrong, or even something is right, without substantiation or a document that will substantiate what that piece of paper says, then that piece of paper doesn't exist.

Q. Well, it was proven to you after Mr. Krippene's death that Bryan Smith had a habitual pattern of reckless conduct of police vehicles, wasn't it?

A. I proved it after I looked at his background.

Q. And it just didn't happen on November 18th, 1994, it had been in existence prior to that time?

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[37] A. I looked at it prior to, but I was concerned with the time since I had arrived in Savannah. And looking at taking into consideration both aspects of that, then I didn't feel that an individual that worked for the Chatham County Police Department, that was sworn to protect the citizens of that county, needed to have a background like that. So, it wasn't one particular incident.

Q. Right.

A. It was a —

Q. Pattern?

A. — pattern of incidents. But I asked for and received the information that pertained to the entries on his background.

Q. So, you would agree with me that prior to Mr. Krippene's death there was an existence in Mr. Smith's personnel file that would demonstrate a pattern of a habitual violation that could endanger the citizens of Chatham County?

A. In my opinion, yes.

Q. Do you believe that one of the Majors should have brought this to your attention beforehand? I know you were in Savannah for a period of two years.

A. Right.

Q. Do you agree with me that one of the Majors . . .

* * *

Appendix H

[39] . . . something set in place, be it discipline or whatever, some type of corrective action to see if in facet the employee will respond.

Q. And if the employee doesn't respond do you agree with me the employee should be terminated?

A. Under my consistency definition, yes.

Q. And did you see in Mr. Smith's personnel file that corrective actions that were taken didn't seem to work with him?

A. Yes, this is a fair statement.

Q. Even prior to Mr. Krippene's death the corrective action didn't seem to work with Mr. Smith?

A. That was basically one of the reasons that I recommended he be terminated.

Q. My question is, prior to Mr. Krippene's death, if you had reviewed his file and seen that the corrective action had been done, such as suspending take-home privileges, vacation days, wasn't working, don't you agree with me he should have been terminated?

A. No, I'm not saying that. If that in fact had been the reason, if the accident in fact had not been the reason for his personnel jacket being brought before me, then if his counseling or his take-home duties, or his — whatever discipline he had, then I would have looked at all of those situations. I can't speculate and say at . . .

Appendix H

* * *

[44] . . . begin to exhibit this type of behavior, then there are three courses. You can discipline, you can train or you can send them for medical treatment or medical help.

Q. Now is that up here or Chatham County?

A. I tried to insure that in Chatham County. In fact, I ordered Bryan to see a psychologist or psychiatrist during the investigation.

Q. Right. Was that by Post Command, or —

A. I'm not sure who it was. I just ordered — I just wanted that done, and one of the reasons for that is, with his background my first concern was the safety of the citizens, and I didn't think that he could perform as a Police Officer and insure the safety of the citizens in the county.

My second concern was, with him as an officer, health, looking into what was happening with him as an individual; therefore, he was ordered to go to talk to a doctor.

And, of course, the third and final was, looking at what had transpired during the time I was there, with training and with those types of things, and what we need to do as an organization to fine tune or to make some particular policy better.

Q. Do you agree with me that that should have been implemented, the steps that you took ultimately, [45] with Bryan Smith, from what you have learned from his file, should

have been implemented before Mr. Krippene's death, looking at all the habitual problems and violations?

A. I would have, yes.

Q. You would agree with me?

A. Yes. As Chief I would have tried to implement those particular types of steps at an earlier time.

Q. Right, and I understand you weren't there.

A. Right.

Q. But what I'm trying — it appeared from your Police experience, that the discipline that had been implemented for Bryan Smith was not what you call effective discipline.

A. To use that term, effective discipline, to me, and this is the way I'm interpreting what you said, I'm thinking about results.

Q. Seeing changes?

A. Result oriented.

Q. Yes.

A. That's a better term.

Q. Okay, result oriented discipline.

A. Right — right, be it termination or be it a better employee.

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Q. What do they call it, what's the term when . . .

* * *

[56] Personnel. So, the ones that I had readily at hand were the documents in which I looked at a pattern that was forming.

So, to be consistent, which I consider as being consistent in discipline, what was working, what wasn't working. And I come to the conclusion that Bryan Smith did not follow orders, Bryan Smith had a problem driving a car. And I felt that because of the progressiveness and the types of disciplinary actions that were given to him, it was in the best interests of the county that he be terminated.

Q. That pattern, or those deficiencies which you showed from a pattern that Bryan Smith, while he worked for Chatham County Police Department, in operating the Police vehicle, existed prior to November of 1994, didn't it?

A. I believe it had to, yes.

Q. And you would agree with me that Police Officers such as Bryan Smith, in operating the police vehicles, either on duty or off duty, owe a duty to the general motoring public to be safe in the operation of the vehicles?

A. That's policy, yes.

Q. And you found that prior to November 14th, 1994, or is it the 18th?

* * *

[79] A. Yes, I did.

Q. And where did he go, for the record?

A. He's the Sheriff now.

Q. And that was an elected position?

A. Yes.

Q. Do you know of any relationship between Bryan Smith and Deanie Frazier?

A. No, I don't.

Q. Do you know if Deanie Frazier supported Chief Al St. Lawrence's campaigns for Sheriff?

A. No, I don't.

Q. Well, would you look in, and I know you weren't there in 1991 when Officer Smith was hired, in '92, as to Exhibit 16, would it indicate to you, from what's being done to Bryan Smith as a result of these incidences, and what's being said is going to be done, but isn't done, that there was a policy of not enforcing corrective action being developed in the department as to Bryan Smith?

A. I can't answer that, counselor.

Q. Well, does it appear — I mean, your opinion.

A. My opinion, and I'm giving it to you as candidly as I possibly can —

Q. And I appreciate that.

A. I can't speak for — I'm saying that in my . . .

* * *

[81] . . . tolerated. But that was starting in 1993, so —

Q. You mean '92?

A. No, I'm talkin' about when I got there.

Q. Okay.

A. I didn't have time to go through all of the records of all the officers there. I had to take them as they occurred. Eventually I would have.

Q. Well, was Bryan Smith's a problem that you inherited because the Police Officers and the department before him failed to discipline him?

A. I would say that Bryan Smith was an officer that should have been either trained more thoroughly, or gotten rid of.

Q. And that was the responsibility of the department heads and the Chief before you, is that what you are telling us?

A. I'm saying that if I had been Chief, so that's a determination that will have to be made somewhere else.

Q. What you are telling me is, because you weren't there that wasn't your responsibility at that time?

A. Once it came to my attention that this was happening then I took what I felt was the appropriate action and I terminated him.

* * *

[115] A. Not specifically. I think that the ones that are in there were more than enough, because they would have been added to this specific list.

Q. We are referring to a written reprimand issued June 29th, 1993. In your experience as an Internal Affairs — you were in charge of Internal Affairs at Dayton before you came to Savannah?

A. That's correct.

Q. Had you ever investigated a Police Officer that had such a personnel record that was laden with repeated incidences, as described in your letter of January 12th, 1995, concerning Bryan Smith?

A. I have had officers investigated. I did not investigate them myself. I was in charge of it, but I have had officers investigated that had reports similar to this.

Q. And were those officers terminated?

A. I think a couple of them were.

Q. Do you know, were there any officers that demonstrated a pattern of reckless disregard of public safety on the highways or the streets, such as Bryan Smith demonstrated?

Appendix H

A. There probably have been.

Q. You say there probably have been. I'm just asking if you recall any specific incidents in your . . .

* * *

APPENDIX I — DEPOSITION OF CORPORAL PETER L. LEOPOLD pp. 12–15

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

vs.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA,

Defendants.

Transcript of Deposition of **CORPORAL PETER L. LEOPOLD,** taken by counsel for the Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 4th day of February, 1997, beginning at approximately 3:10 p.m.

Appendix I

APPEARANCES:

For the Plaintiff: FREDERICK S. BERGEN, ESQUIRE
123 EAST CHARLTON STREET
SAVANNAH, GEORGIA 31401

For the Defendant: EMILY GARRARD,
ASSISTANT COUNTY ATTORNEY
POST OFFICE BOX 8161
SAVANNAH, GEORGIA 31412

* * *

[12] Q. What's the next step after take home privileges, suspension?

A. It wasn't really consistent, you know. They may take your car away from you, you know, a couple of times. But it wasn't — at that time, it wasn't consistent. Now, there is a little more — a little more consistency than there was in the past, but at the time, it wasn't consistent. I mean they may take your car away from you, you know, two or three times, you know, if the accidents were minor. And, I don't know if I recall off hand, you know, in an at fault accident where there weren't any injuries or anything where they might have — might have suspended somebody.

Q. But you're saying from the period of time I'm talking about, '91 to '93, there was never —

A. — It was inconsistent.

Q. — it was inconsistent as to how discipline was administered to drivers of vehicles.

A. Right.

Q. You say now it's more consistent discipline?

A. It's probably a little more consistent, you know, between that time period and today, you know, we're talking about a department that's trying to be accredited and in that line, you know, their SOP's are being put in black and white rather than — they may have been arbitrary, you know, in the past but now, you know, as a requirement to become [13] accredited, then everything is pretty much in black and white.

Q. And, the period again we're talking about which you have described as inconsistent discipline would have been that '91 period to '94 when Mr. Smith was employed as a Chatham County Police Officer.

A. Right.

Q. And, did you see a change in discipline when Chief Lowe arrived as to how police officers were disciplined concerning operating their vehicle in a safe manners?

A. If there was a difference, I really didn't — didn't notice.

Q. When did you first start noticing a difference — under whose command?

A. Under Lowe's command, that was a period of time where, you know, things were starting to be pretty much mandated by SOP.

Q. Before that —

A. Consistency, you know, I mean if you wrecked your car you knew you were going to lose it, you know, at the very least. I mean rather than in the past maybe nothing would have happened. The car would be fixed or whatever, but you know, you at least knew that if you wrecked your car, you know, you were going to lose your car.

Q. Well, let's talk —

[14] A. Beyond that, you know, I don't know that I've had any experience, you know, with somebody that wrecked their car repeatedly within such a short period of time that you would expect something worse than losing your car.

Q. But, prior — let's say the time that Mr. Smith was employed, during that time period, there was never really — you mentioned that you now know if you wrecked a car you know you're going to have repercussions, correct?

A. Right.

Q. But before that time when Mr. Smith was working there, was it kind of understood within the police force that there were no — you didn't know what would happen if you wrecked your car or demonstrated unsafe driving practices?

A. Well, you know, if you're talking specifically about Bryan Smith, you know, when he was under my — my supervision, I mean — I believe he had one accident. So, you know, whatever happened to him in previous incidents, you know, I don't know. I mean I have no idea what kind of discipline was given to him and where — and where in my mind or where in the police department's mind at what stage he

should have been as far as disciplinary action that had been taken toward him. I don't know what stage —

Q. I understand that. What I'm trying to find out, and what you've indicated to me if I'm hearing you correctly, during the period of time that Mr. Smith — and as a Chatham [15] County Police Officer — you've already told me there was no real consistency on disciplining unsafe drivers, correct?

A. Right.

Q. And, what I'm wanting to ask you about is was that kind of understood within the police force?

A. His immediate supervisor —

Q. I'm not talking about Mr. Smith. I'm talking about what you perceived.

A. Anyone's immediate supervisor would — and most of the supervisors on the watch were fairly level in their understanding of what discipline somebody needed, you know, for whatever infraction they may have committed. And, they would go on that recommendation, you know. As far as the department is concerned, you know, it may not have heed too consistent, but as far as what was recommended to the department, you know, that was a fairly consistent-type decision. In other words, if someone on my watch were to have an accident and, you know, what I may recommend as disciplinary action send it through the chain of command would be consistent with most — I would say all of the other watch supervisors. And, if it got to the point where it was progressing and didn't seem to be, you know, a problem. I know now that they will — just say

one difference. If you have an accident, you know, they're going to send you to Emergency Vehicle Operation, which is a school that they give . . .

* * *

APPENDIX J — DEPOSITION OF CORPORAL NEAL OWENS pp. 9–14, 21, 22

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

vs.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA,

Defendants.

Transcript of Deposition of **CORPORAL NEAL OWENS**, taken by counsel for File Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 24th day of February, 1997, beginning a approximately 8:05 a.m.

Appendix J

APPEARANCES:

For the Plaintiff: FREDERICK S. BERGEN, ESQUIRE
123 EAST CHARLTON STREET
SAVANNAH, GEORGIA 31401

For the Defendant: EMILY GARRARD,
ASSISTANT COUNTY ATTORNEY
POST OFFICE BOX 8161
SAVANNAH, GEORGIA 31412

* * *

[9] (Plaintiff's Exhibit One, Affidavit, was marked for purposes of identification).

Q. You may be familiar with this already, but I'll give you a copy so I can — that's a copy of your Affidavit that you executed at the request of the County Attorney (tendering)?

A. Yes, sir.

Q. Let me ask you this. You stated in your Affidavit on May 12, 1992 you clocked Bryan Smith traveling thirty miles an hour over the speed limit twice within forty-five minutes.

A. Yes, sir.

Q. And, apparently the location was on the Islands Expressway.

A. Yes, sir.

Appendix J

Q. And, do you recall what tine of day it was?

A. It was late — late evening between six and eight o'clock.

Q. Okay. And, were you just patrolling the area?

A. No, sir.

Q. Tell me about the circumstances.

A. At that time I was assigned to the DUI Task Force which is still out of the Traffic Unit. And, I was working — we either worked from six to two or from eight to four. [10] And, I was sitting in the median running a stationary radar.

Q. Okay. And, you say you clocked him traveling thirty miles an hour over the speed limit and tile speed limit was fifty miles an hour on Islands Expressway?

A. Yes, sir.

Q. So, he would have been going eighty miles an hour plus?

A. Yes. To the best of any knowledge, it was eighty miles an hour.

Q. Okay.

A. It may have been eighty-one, eighty-two, but it was around eighty miles an hour.

Q. Was he on a assigned call?

A. Not that I knew of. I had heard — his car number was 140. I had heard him — 140 ask Chatham was a 33 clear, which is a dinner break. And, they said, "10–4," and like I said, I was sitting in the median running radar and I knew he was assigned to Division One, which was Whitemarsh Island. Maybe five, ten minutes later I — I had a dual antenna radar, one in the front and one in the back. I had activated the radar. I was clocking the traffic coming up behind me and —

Q. — Which direction would you have been headed?

A. You're familiar with the boat ramp on Islands Expressway?

[11] Q. Right.

A. Right there at the draw bridge.

Q. Yes, sir.

A. I was sitting maybe 300 yards east of that bridge.

Q. Okay. So, you would have been at that time clocking the traffic going which direction? Out towards —

A. — Towards Savannah, like coming into —

Q. — Okay. Coming into Savannah.

A. Right. With the rear antenna. I was facing this way.

Q. You were facing towards Savannah?

A. Right.

Q. Towards the bridge.

A. Right. And, I was clocking with the rear antenna.

Q. Okay.

A. The radar was activated. Like I said, I don't recall the exact speed; around eighty miles an hour. It was moderate traffic. It wasn't heavy traffic. You know, there may have been four or five other cars, but I recall when Bryan came by and two or three minutes later he held out somewhere on his 33.

Q. Okay. But had he called for a 33 prior to when you clocked him?

A. Yes, sir.

Q. Okay. So, you were aware that Bryan Smith, car [12] number 140 at that time had permission to go to dinner.

A. Right.

Q. To get something to eat somewhere.

A. Right.

Q. And, then a few minutes later all of a sudden you clocked him on your radar going in excess of eighty miles an hour.

A. Right.

Q. He didn't have his blue lights on.

A. No, sir. —

Q. Did you pull him over?

A. No, sir.

Q. Why not?

A. Well, that's a marked unit pulling over another marked unit. I was going to get with Bryan when he cleared from his 33 and just tell him, say, "Look, you know, don't — if you see me sitting in the median, you know, don't do that."

Q. Is that kind of what the policy that you'all would do, is not to pull over unmarked — I mean a marked unit?

A. At the time we had had apparently a great deal of complaints on speeding patrol cars and I don't remember if it was written, I'm sure it was. The Traffic Unit officers were advised if we saw officers speeding to let their supervisor know. And, like I said, I was going to get with Bryan when [13] he cleared from his 33, you know, and see what kind of response I got out of him to see how I would take the next step.

Q. So, at that time as you understood, there had been complaints. Was it from other citizens?

A. Yes, sir.

Q. Of patrol cars speeding not responding to a call, I take it.

A. Apparently so.

Q. Okay. And, as I understand, either you believe it was written or you were told. Do you think it was written?

A. I don't recall. It's been so long ago, I don't recall.

Q. But you understood that you'all were supposed to do

A. — Right.

Q. — if you clocked somebody such as Bryan Smith who is going to lunch, speeding eighty miles an hour in a fifty-five mile an hour zone, report it to the supervisor.

A. Right.

Q. You weren't to write them up a ticket.

A. No, sir.

Q. Was it a — was it a policy not to write up a speeding ticket to a police vehicle?

A. Not that I know of.

[14] Q. But you understood that was the — for this particular time if you clocked a marked vehicle speeding, you were just to report it.

A. Right.

Q. Okay. You weren't to do any — you weren't to write a speeding ticket.

A. Not to my knowledge, we were not supposed to.

Q. And, that was a department-wide policy for the Traffic Unit.

A. I don't know if I'd call it a policy.

Q. Or practice.

A. That's what we were told to do.

Q. That's what you'all were told to do.

A. Uh-huh.

Q. Let's take it back. As I understand it, so that was the first time you caught him speeding that day.

A. Right.

Q. And, what did you do, just make a mental note of this incident? The first time. I mean you said you were just going to get with him later.

A. Right. Yes, sir. When I heard him clear from his 33, I was going to get with him.

Q. When you say, "Clear with his 33," what do you mean by that?

A. When he's done. When he's back —

Appendix J

* * *

[21] A. You're just a regular Joe Smoe riding around.

Q. Isn't it true that he — Bryan Smith had not come back off of dinner break the second time that he was caught speeding?

A. Yes, sir. He had already cleared up. He went 10-8 with Chatham.

Q. Okay. He had already — okay — I'm glad you explained that to me. The first time he was cleared to go to dinner.

A. Right. He was in route to wherever he was going to eat.

Q. Okay. And, then the second time within forty-five minutes, had he gone back on patrol or was he still —

A. — No, he had already cleared up.

Q. Okay.

A. And, went 10-8 back in service.

Q. And, the second time he was not responding to an emergency call, was he?

A. No, sir.

Q. He wasn't using his blue lights, was he?

A. No, sir.

Q. So, he is subject to the same Georgia motor vehicle laws that you — that I'm subject to.

A. Same uniform rules of the road.

Q. Okay.

[22] A. Just like anybody else.

Q. However, he — if Fred Bergen or Emily Garrard was going down Islands Expressway at eighty or eighty-one miles an hour, you would have pulled us over, wouldn't you?

A. Definitely.

Q. And, you would have issued us a ticket.

A. Probably so.

Q. Okay.

(Note: Off the Record)

(Note: Record Resumed)

Q. (By Mr. Bergen) Basically you would have written up a citizen —

A. — Yes, sir.

Q. — for the same violations that Bryan Smith on both occasions.

A. Right.

Q. By virtue of the fact that he was a policeman on your same — with your same authority, you didn't write him up.

A. Right.

Q. Give him a ticket in other words.

A. Right.

Q. And, is that what the practice was —

MS. GARRARD. — I think he's already answered that question. You've already asked him that several . . .

* * *

APPENDIX K — DEPOSITION OF MAJOR WILLIAM FREEMAN pp. 50, 51

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

vs.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA,

Defendants.

Transcript of Deposition of **MAJOR WILLIAM R. FREEMAN,** taken by counsel for the Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 6th day of February, 1997, beginning at approximately 1:00 p.m.

Appendix K

APPEARANCES:

For the Plaintiff: FREDERICK S. BERGEN, ESQUIRE
123 EAST CHARLTON STREET
SAVANNAH, GEORGIA 31401

For the Defendant: THOMAS J. MAHONEY. JR., ESQ.
POST OFFICE BOX 8161
SAVANNAH, GEORGIA 31401

* * *

[50] it.

Q. Okay. The next Exhibit, Number Twenty-six, deals with the January 20th, 1993 incident of the engine damage to 908, with attached Confidentials, does it not?

A. Yes, it does.

Q. You apparently — it was addressed to you by H. J. Lowery.

A. That's correct.

Q. And, did that result in any action?

A. Yes, it did. Not necessarily the water in the engine, but what was the result of that that happened.

Q. Do you know what — the second page of that Exhibit is missing. That Exhibit was attached as Exhibit Number Five

to Artis Thomas' deposition today. I apologize. This might be easier for you. I'm sorry.

A. That's okay. Okay.

Q. According to Captain Lowery, he states, "In checking Officer B. D. Smiths personnel file, I found that Officer Smith has a past history of bad driving habits," and summarized those habits. You were already familiar with those habits and had already previously advised Chief Davin of those problems, correct?

A. Of the May 13th, that's correct.

Q. And, now we have another incident involving disregard of orders which resulted in the operation of a [51] vehicle, correct?

A. That's correct.

Q. Did you feel that that was appropriate and sufficient discipline of Officer Smith on January 27th, '93?

A. The 180 days?

Q. Yes, sir.

A. Yes, I did.

Q. Again, it states, "When any more incidents of this type occur in the future more severe disciplinary action will be taken against Officer Smith."

A. That's what Captain Lowery has in his memo, that's correct.

Q. That seems to me — is that something you'all always say in these reports?

A. No. You can see it's progressively went up.

Q. When is it going to get to a point where he's off the force?

A. Didn't Chief Lowe fire him?

Q. After someone was killed. Is that what it took?

A. I don't know. Is that what you're saying?

Q. That's what I'm asking you.

A. Well, I can't answer that.

Q. Well, as to your recommendation —

A. — He had a wreck there and I suppose that's what Chief Lowe fired him about.

* * *

APPENDIX L — DEPOSITION OF CHIEF RONALD LOWE p. 78

IN TIIE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NUMBER CV496-211

NANCY KIMBALL KRIPPENE, Individually and as the Executrix of the Estate of URBAN M. KRIPPENE, deceased

Plaintiff

vs

RONALD LOWE, Sr., Individually and as Chief of Police of Chatham County Police Department

and

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA

and

CHATHAM COUNTY, GEORGIA Political Subdivisions of the State of Georgia

Defendants

DEPOSITION OF
RONALD LOWE, SR.
JANUARY 22, 1997

Appendix L

* * *

[78] that more severe disciplinary action be taken against Officer Smith."

Now I know you were not there at that time, but that is a similar type memorandum as we saw earlier, back in 1991.

A. Right.

Q. In which he stated, if "any more accidents occur in the future I recommend to you that more severe disciplinary action be taken against Officer Smith."

Well, certainly this has occurred since August of '91, and here we are seeing another memo of April the 23rd of '93, in which no action is being taken against the man.

A. I understand that, counselor, but see who it's to?

Q. I know it is not to you.

A. Right.

Q. But certainly you and I can agree that Major Freeman was aware of the problems Bryan Smith was exhibiting in the vehicle.

A. I would say according to his Confidentials, yes.

Q. And certainly Chief St. Lawrence was aware?

A. They read them, yes.

Q. And did you replace Al St. Lawrence?

* * *

APPENDIX M — DEPOSITION OF CHIEF AL ST. LAWRENCE p. 30–31

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

vs.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA

Defendants.

Transcript of Deposition of **SHERIFF AL ST. LAWRENCE,** taken by counsel for the Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 5th day of February, 1997, beginning at approximately 2:10 p.m.

Appendix M

APPEARANCES:

For the Plaintiff: FREDERICK S. BERGEN, ESQUIRE
123 EAST CHARLTON STREET
SAVANNAH, GEORGIA 31401

For the Defendant: THOMAS J. MAHONEY, JR., ESQ.
POST OFFICE BOX 8161
SAVANNAH, GEORGIA 31401

* * *

[30] because of this upcoming special election that I was going to get involved in. I had taken some time off and so forth, but I don't — but even if I hadn't I couldn't recall all of the Confidentials and reports that are written on people; maybe they are two or three minutes late for work or something of this nature. I don't recall those things.

Q. But nonetheless — that's fine. Now, did this — when this occurred — when you received the August 14th, '91 Memorandum, do you recall if you even talked with Major Freeman as to —

A. — I don't recall. I'm sure I probably did, but I don't — I can't sit here and tell you that I specifically — that we talked and what we talked about. I might have told him at the time, "I've had about enough of this guy." I don't know. I mean I don't recall, you know.

Q. Well, did it start to show to you that this man may have been posing a problem being employed with the Chatham County Police Department?

A. Well, that certainly, you know, that could have been developing, but you know, I would still be guided by what Major Freeman's recommendation would be to me, unless it was an incident like an incident I described to you earlier; some theft involved or something of that nature. Then it wouldn't have made no difference whether he had recommended anything or not. I know what I would have done.

[31] Q. You would have fired him.

A. Absolutely.

Q. But from what we've seen developing up from August 14th of '91, would this have given you concern about this police officer?

A. Yeah, that's the reason why they were paying attention — particular attention to what he was doing.

Q. This is the next Exhibit, Number Eleven. It is to you from Lieutenant R. L. Oliver, Internal Affairs, dated September 20, 1991. If you would take a minute to read it, I have a couple of questions (tendering).

A. I guess is the first time I've seen this. I probably seen it back then. I don't recall.

Q. As to the normal course of things, if it was sent to you, you would have read it. It would have come across your desk, as you've referred to it, correct?

A. Yeah.

Appendix M

Q. And, I presume — and correct me if I'm wrong — you would have read this at that time or there abouts August — or September 20th of '91?

A. Uh-huh.

Q. Correct?

A. Yeah.

Q. All right. This concerns, from what you've read, a harassment complaint by apparently a former girlfriend of . . .

* * *

APPENDIX N — DEPOSITION OF MAJOR WILLIAM FREEMAN pp. 46, 47

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

vs.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA

Defendants.

Transcript of Deposition of **MAJOR WILLIAM R. FREEMAN**, taken by counsel for the Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 6th day of February, 1997, beginning at approximately 1:00 p.m.

Appendix N

APPEARANCES:

For the Plaintiff: FREDERICK S. BERGEN, ESQUIRE
123 EAST CHARLTON STREET
SAVANNAH, GEORGIA 31401

For the Defendant: THOMAS J. MAHONEY, JR., ESQ.
POST OFFICE BOX 8161
SAVANNAH, GEORGIA 31401

* * *

[46] A. What potential? That he was a danger?

Q. Yes, in operating vehicles to the motoring public.

A. No. No more than anyone else.

Q. Despite what you knew about his driving habits?

A. No, I did not.

Q. Do you believe he was demonstrating at that time unsafe driving habits?

A. If he had been doing safe driving habits, he wouldn't have gotten a thirty day take home privilege revoked.

Q. So, I guess the answer to my question is yes.

A. Yes.

Appendix N

Q. Exhibit Number Twenty-three is Inter-Office Correspondence to Chief Davin to yourself — I mean from yourself dated May 22, 1992. Now, you noted a correction in one of the sentences, did you not?

A. Yes, I did. Are you talking about the negative retention?

Q. Right.

A. Should have been negligent retention.

Q. Okay. The sentence should read due to the number of accidents it seems that we may be dealing with a negative — a negligent retention problem is what it should say.

A. Yes, that's what it should say.

Q. Okay. And, then you stated, "I would also [47] recommend that if Officer Smith has any more accidents that his employment at the Chatham County Police Department be terminated."

A. That's correct.

Q. This was a response — immediate response on this memorandum was regarding the speeding violations.

A. The speeding and put it all together, yes, the speeding.

Q. Okay. And, when you talk about dealing with a negligent retention problem, you're talking about the County maintaining — retaining an employment who was negligent on its force.

Appendix N

A. I was talking about a individual that already had two accidents that were his fault. He had already been caught twice in one day speeding. And, that we may have a problem with this employee.

Q. Well, a negligent retention problem means you're retaining someone who is negligent.

A. Absolutely. That's what the word means.

Q. Okay. Did Chief Davin give you any response to your warning to him?

A. I don't recall.

Q. We were talking about the negligent retention problem with Officer Smith. This was basically something you were trying to make the Chief aware of, correct?

* * *

APPENDIX O — EXPERT WITNESS REPORT OF DANIEL S. RAY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO. CV496-211
[JURY DEMANDED]

NANCY KIMBALL KRIPPENE, Individually, and as the Executrix of the Estate of URBAN M. KRIPPENE, deceased,

Plaintiff,

vs.

RONALD LOWE, SR., Individually and as Chief of Police of Chatham County Police Department; and BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA and CHATHAM COUNTY, GEORGIA, Political Subdivisions of the State of Georgia,

Defendants

EXPERT WITNESS REPORT OF DANIEL S. RAY

NOW COMES Danny Ray, and pursuant to *Federal Rules of Civil Procedure 26(2)(B),* and provides this Court in compliance with Local Rule 8.6(a)(4) for the Southern District of Georgia, this Expert Witness Report as follows:

1. *Identity of Expert Witness.*

Daniel S. Ray
Post Office Box 1057
Perry, Georgia 31069

Appendix O

2. *Complete statement of all opinions to be expressed and the basis and reasons therefore.*

Response:

Mr. Ray is of the opinion, based upon the documents identified in Response #3 of this Report, that the Chatham County Police Department through its Chief and Supervisors failed to take appropriate action to train, re-train, discipline and terminate APO Bryan Smith from the Chatham County Police Department prior to the fatal collision with Urban Krippene on November 18, 1994 when Officer Smith clearly demonstrated an habitual failure to follow orders, take commands, obey the traffic laws of the State of Georgia and Chatham county Police Department Standard Operating Policies and Procedures, as well as the Chatham County Ordinances in carrying out his duties and operating a Chatham County Police Vehicle. It is further Mr. Ray's opinion, that as a result of the Chatham County Police Department's failure to take appropriate and necessary action against Officer Bryan Smith, that Chatham County Police Department adopted, adhered to and ratified these inappropriate actions and created a policy of not properly training, re-training, disciplining and terminating Officer Bryan Smith which resulted in Officer Bryan Smith's continued inappropriate and unsafe operation of Chatham County Police Vehicles which created a danger to the motoring public of chatham County prior to and including November 18, 1994.

Appendix O

3. *The data or other information considered by the witness in forming his opinions.*

Response:

a. Bryan D. Smith's Employment File with the Chatham County Police Department and Chatham County Sheriff's Department.

b. Georgia Uniform Motor Vehicle Accident Report of November 18, 1994.

c. Chatham County Staff Accident/Incident Report of Cpl. D.E. Barnes.

d. APO B. Smith's Chatham County Police Departmental Incident Report.

e. Chatham County Police Department's Inter-Office Correspondence from APO S.J. Simpkins to Captain H.J. Lowery dated November 23, 1994.

f. Chatham County Police Department Inter-Office Correspondence from Sgt. A.F. Thomas of Internal Affairs to Chief Ronald Lowe, Sr. dated November 23, 1994.

g. Chief Ronald Lowe, Sr.'s letter dated November 29, 1994 to APO B.D. Smith.

h. Chatham County Police Department Inter-Office Correspondence from Sgt. A.F. Thomas of Internal Affairs to Chief Ronald Lowe, Sr. dated December 21, 1994.

Appendix O

i. Chief Ronald Lowe, Sr.'s letter dated January 12, 1995 to APO B.D. Smith.

j. Chatham County Police Department SOP Manual Section 10-040.

k. January 1, 1990 Chatham County Personnel Ordinance and Personnel Procedures Manual.

4. *Any exhibit to be used as a summary of or support the opinions.*

Response:

None at this time; however, Mr. Ray reserves the right to Supplement this Response.

5. *The qualifications of the witness including a list of all publications authored by the witness within the preceding ten (10) years.*

Response:

Mr. Ray has over 25 years experience in Law Enforcement. Mr. Ray also served from March 1, 1991 to February 21, 1996 as the Senior Agent In Charge of Region Eight of the Georgia Peace Officer's Standards and Training Council, which is the State Licensing Authority for the State of Georgia for all Peace Officers, including all Chatham County Police Officers. Mr. Ray, while serving as Senior Agent in Charge of Region Eight of the Georgia Peace Officer's Standards and Training Council, was responsible for all Peace Officer Investigations in Region Eight relating to certification/criminal charges, annual personnel audits of all departments, investigate and report to the Governor

or Attorney General regarding complaints against Departments or officers, assist Departments with technical matters relating to Peace Officers Standards and Procedures, inspect academies on yearly basis relating to standards and rules, evaluate instructors in classroom environment to ensure all Georgia P.O.S.T. Rules and Regulations are followed, and investigate backgrounds of individuals with problems indicated on application.

Also, Mr. Ray served as Assistant Post Commander for Georgia State Patrol from August 1989 to March 1991 with responsibilities of the day to day operations of the Georgia State Patrol Post Departments, investigate applications from Post Territory, check accuracy of investigated reports, liaison with Judicial Agencies, routine patrol of all routes and Post Territory and review of Standards and Procedures relating to the Georgia State Patrol.

Mr. Ray has not offered any publications within the preceding ten years.

6. *The compensation to be paid for the study and testimony.*

Response:

$100.00 an hour plus expenses.

Appendix O

7. *A listing of other cases the witness has testified as an expert witness at trial or by deposition within the preceding four (4) years.*

Response:

Mr. Ray has not testified at trial or deposition within the preceding four years.

This 19th day of December, 1996

s/ Daniel S. Ray
DANIEL S. RAY

No. 97-1587

(2)

Supreme Court, U.S.
FILED
APR 30 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

NANCY KIMBALL KRIPPENE, Individually, and as the Executrix of the Estate of URBAN M. KRIPPENE, Deceased,

Petitioner,

vs.

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA and CHATHAM COUNTY, GEORGIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

JOSEPH B. BERGEN
Counsel of Record
FREDERICK S. BERGEN
Attorneys for Petitioner
123 East Charlton Street
Savannah, Georgia 31401
(912) 233-6600

146210

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

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42 *U.S.C.* §1983 . . . . . 1, 2, 3, 6

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Petitioner files this Reply Brief addressed to contested new points raised in the Brief in Opposition, Priority Mailed First Class to Petitioner on April 23, 1998 and delivered Saturday afternoon, April 25, 1998.

1. The first contested point is the contention by the Respondents that Chatham County Police Officer Bryan Smith, who drove the speeding County Police vehicle on his way to work while not on a high-speed chase and collided with Petitioner's decedent Urban M. Krippene and caused his death, was not a named Defendant in the *Section 1983* Action.

The Respondents raise the issue of there not being a compelling reason for granting a Writ, by focusing on an automobile accident with Petitioner's decedent involving a Chatham County Police Officer driving to work not constituting a Constitutional deprivation under 42 *U.S.C.* §1983. Respondents argue that in this Case there is no departure by a lower Court calling for an exercise of this Court's supervisory power such as a character of the reasons this Court considers. The Respondents argue that there is "*no split*" in any of the Circuits regarding Municipal Liability in the case of an automobile accident between a citizen and a Police Officer not involving a high-speed pursuit or an emergency.

The thrust of this Opposition is the contention that there is a Municipal Liability difference between a high-speed

pursuit/emergency situation and circumstances involving Police Officers engaging in officially unrestrained, known indiscriminate high-speed use of Police vehicles.

The Respondents object to Plaintiff's Complaint having been filed only against Chatham County and focusing on Local Government Liability, as opposed to the Standard of Liability for Officers in the context of high-speed vehicular pursuits.

The Respondents dispute the applicability of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), now being considered by the Supreme Court on *Certiorari*, because *Note 5* in *Lewis, Id.* 439, referring to the Court's "*broad spectrum*" ranging throughout the various Circuits regarding official conduct that constitutes a *Section 1983* Due Process violation, does not apply to a local government in a "*simple automobile accident*" involving the officer's "*entitlement to qualified immunity*".

In the Case *sub judice*, it should be plainly obvious to all, that the County's continuing dereliction involving the deliberate disregarding of "*a known or obvious consequence of [their] action*" and the actions of Officer Smith did occur "*before*" the fatal occurrence here and that both the County's and Officer Smith's relevant derelictions also occurred both "*before*" and as well as *at the time* of the fatal collision. The required "*underlying constitutional deprivation*" supporting this claim against the County for Smith's actions and the deliberate actions of the

County permitting Smith's actions, which were an obvious consequence of his permissive, known improper use of a County vehicle, has been established by Petitioner. This deliberate failure on the part of the County under the policy or custom of the County, was "*a direct causal link between a municipal policy or custom an the alleged Constitutional deprivation*" of Mr. Krippene's rights. *Canton v. Harris*, 489 U.S. 378, 385, 103 L.Ed.2d 412, 424, 109 S.Ct. 1197 (1989); *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. _____, 137 L.Ed.2d 626, 117 S.Ct. 1382 (1997). There is abundant evidence of conduct in this Case that is outrageous and that "*shocks the conscience*".

The Respondents' attempt to exclude the County under the circumstances presented by the Petitioner, relies on a strained interpretation of *Lewis, supra*, that can be properly construed as involving any "*high-speed*" occurrence which takes place under color of State Law that would support a *Section 1983* claim because of such "*deliberate*" failures that caused a Constitutional violation and the "*moving force*" behind the injury alleged. The Petitioner has shown that the County action here "*was taken with the requisite degree of culpability and [has] demonstrate[d] a direct causal link between the [County] action and the deprivation of federal rights*". *Brown, Id.*, 137 L.Ed.2d 626, at 639. The "'*deliberate indifference' to the obvious consequences*" of Chatham County's Policymakers' choice in allowing its Police Officers to indiscriminately speed

in Police vehicles presented a "*high degree of predictability*" that would support an "*inference of causation*" in this Case — that Chatham County's "*indifference led directly to the very consequence that was so predictable.*" *Brown, Id.*, 137 L.Ed.2d 626, at 643.

2. The second contested point is the contention by the Respondents that the County did not condone a pattern of reckless disregard for public safety on the highways and streets by not requiring the issuance of traffic Citations to their Police Officers who exceeded the speed limit, when not responding to a Call, in violation of State Law.

It is plain from the Depositions taken (Petition Appendix G, H, I, J, K, L, M and N), that Chatham County specifically authorized their County Police Officers and Supervisors to use their own judgment in determining whether a speeding Citation should be issued to their Police violators, resulting in the County allowing its Police Officers to violate State Law controlling vehicular speed. The County's established custom and policy of leaving "*it up to the officer on the street whether to issue a ticket to a speeding officer*" (Respondents' Appendix A, St. Lawrence Depo, p.52-53) and leaving "*it entirely up to the supervisor whether to issue a citation*" (Respondents' Appendix B, Freeman Depo, p.43-44), and "*that if [Cpl. Owens] saw officers speeding, to let their supervisors know*" (Respondents' Appendix F, Owens Depo, p. 12, 15-16; Appendix B, Freeman Depo, p. 44) and the Deposition of Cpl. Leopold

(Petitioner's Appendix I, Leopold Depo, p. 15), clearly establishes the County officially sanctioning its Police Officers to violate the Law with impunity since it appears that no speeding Citations were ever issued to its County Officers who exceeded the speed limits while not on Call.

The Respondents contend that the characterization of any person below the level of Chief as a Policymaker, is disputed, notwithstanding former Chief St. Lawrence having testified that it was "*up to the officer on the street whether to issue a ticket to a speeding officer*" (*Id.* p.52-53), which clearly shows that the Chief of Police delegated this decision to other Police Officers in the Chatham County Police Department Chain-of-Command.

The Chief of the Chatham County Police Department established the policy of allowing Officers on the street and the Supervisors to make decisions as to whether speeding Citations should be issued to other offending Police Officers. This was not only the custom employed, but the established policy that left Officer Smith to speed unrestrained at-will. *Pembaur v. Cincinnati*, 675 U.S. 469, 483-484, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986); *Collins v. Harker Heights*, 503 U.S. 115, 122, 117 L.Ed.2d 261, 271, 112 S.Ct. 1061 (1992).

3. The third contested point is the contention by the Respondents that Counsel for Petitioner acknowledged during Oral Argument before the Court of Appeals that Smith's conduct did not constitute a

Constitutional deprivation.

The Respondents make this *extra judicium* utterance outside the Record presented to this Court, that is both taken out of context and misinterprets what Petitioner's Counsel said to the Court of Appeals.

Petitioner's Counsel commented that the suit was filed against the County, not former Police Officer Smith, for the *Section 1983* violations of the County in permitting the conduct of Smith which the Petitioner's Counsel had otherwise argued did also constitute a Constitutional deprivation of the rights of the late Mr. Krippene and that this deprivation was committed by both the County and Smith at the time of the vehicular collision resulting in Mr. Krippene's death, even though Petitioner had rightfully elected to sue only the County.

Nevertheless, the County, as shown, did independently, customarily and deliberately allow Smith to continue his habitual violation of both its other asserted policies and Georgia State Law, which custom became a policy in itself, that foreseeably culminated in the collision with Mr. Krippene's vehicle while Smith was permissively driving a Police vehicle to work in a manner that was under color of State Law. The County's failure to properly train and control Smith, which the County admitted as presenting a "*negligent retention problem*" (Freeman Depo, Petitioner's Appendix N) and its policy of not controlling its Police Officers' speeding

while not on Call, were failures that "*caused the constitutional violation*". *Canton*, 489 U.S. at 391, 103 L.Ed.2d at 428; *Collins v. Harker Heights*, 503 U.S. 115, 122, 117 L.Ed.2d 261, 271, 112 S.Ct. 1061 (1992)[1].

The contention that the collision "*could have happened if Smith had been driving his family car to work*", *begs the question*. Further, the causation, as presented by the Respondents at the end of their Statement Of The Case, concerning the liability for the collision itself, is not an issue now before this Court.

THEREFORE, for the reasons set forth in the Petition and this Reply, the Petition should be granted.

---

[1]Respondents' *Footnote 1* points out that Petitioner incorrectly stated that *Collins* involves a high-speed police pursuit. Petitioner inadvertently attributed the high-speed pursuit in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986) cited at p.13 of the Petition for Writ of Certiorari immediately preceding the *Collins* citation, as the basis of the action in *Collins*.

Respectfully submitted:

JOSEPH B. BERGEN
Counsel of Record

JOSEPH B. BERGEN
Ga. State Bar No. 054200
D.C. Bar No. 428804
and
FREDERICK S. BERGEN
Ga. State Bar No. 054160
123 East Charlton Street
Savannah, Georgia 31401
(912) 233-6600

Attorneys for Petitioner

Supreme Court, U.S.
FILED
APR 23 1998
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No. 97-1587

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NANCY KIMBALL KRIPPENE, INDIVIDUALLY, AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,
Petitioner,

v.

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA and CHATHAM COUNTY, GEORGIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS J. MAHONEY, JR.
Counsel of Record
EMILY E. GARRARD
CHATHAM COUNTY ATTORNEY'S OFFICE
P.O. Box 8161
Savannah, GA 31412
(912) 652-7881
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Are there compelling reasons for granting a writ of certiorari when the automobile accident involving Mr. Krippene and a Chatham County Police officer driving to work does not constitute a constitutional deprivation that could subject Respondents to liability under 42 U.S.C. § 1983?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1587

NANCY KIMBALL KRIPPENE, INDIVIDUALLY, AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,
Petitioner,

v.

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA and CHATHAM COUNTY, GEORGIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On November 18, 1994, Chatham County ("County") Police Officer Bryan D. Smith was driving his police vehicle to work and collided with Petitioner's husband, Urban M. Krippene, who subsequently died. Smith was not on a high-speed pursuit or emergency call. The County terminated Smith after its investigation concluded that Smith had exceeded the posted speed limit and violated County Police Department Standard Operating Pro-

cedure ("S.O.P.") #10-040 which requires officers to drive safely and obey traffic laws except when in actual pursuit or emergency.

There is no evidence of any constitutionally offensive conduct by Smith or *any* County police officers. The following incidents of poor judgment, negligence and failure to follow departmental policy on the part of Smith involve *performance* related problems and not constitutional deprivations against *any* citizens.

On April 13, 1991, Bryan D. Smith was hired to work at the Chatham County Police Department as a patrol officer. Chief St. Lawrence and Major Freeman were not aware of Smith's unacceptable performance evaluation during his previous employment at the Sheriff's Department. (App. A, St. Lawrence depo., p. 11, 15; App. B, Freeman depo., p. 11; Petitioner's App. E) Nowhere in the March 19, 1991 performance evaluation does it state that Smith had violated the constitutional rights of any citizens. (*Id.*; App. C, St. Lawrence depo., Exh. 6)

In 1991, Chief St. Lawrence was notified that Officer Smith was deficient in his work performance due to an inability to follow instructions and complete reports. Smith was counseled and advised that he would be terminated if significant improvements were not made. In July, 1991, Smith's ex-girlfriend made a complaint to the Police Department of a sexual assault by Smith. Internal Affairs reported this complaint to Chief St. Lawrence. The ex-girlfriend decided not to prosecute. Major Freeman decided to transfer Smith to a different watch to be evaluated by another supervisor after reviewing a memo from Smith's superiors stating there was no significant improvement in Smith's performance.

On August 14, 1991, Major Freeman recommended that Smith's take home privileges be revoked for 3 days because he was in an accident in his police vehicle when

he turned into the path of a vehicle. No injuries were reported. Major Freeman also recommended more severe disciplinary action if further accidents of this type occurred.

On January 29, 1992, Major Freeman was informed that Smith had been in an accident while responding to a Code 3 call. No injuries were reported. No further action was necessary because there was no violation of departmental rules or policy. On February 7, 1992, Smith completed a course entitled "Basic Emergency Vehicle Operations."

On April 20, 1992, Smith was involved in an accident in his police car while responding to a "Code 2—Urgent—Proceed as Soon as Possible" call. Smith struck another vehicle in the rear. No injuries were reported. Major Freeman instructed Sgt. Nichols to cite Smith for following too close. The County's accident investigation concluded that Smith was traveling faster than he had indicated and that he had caused the accident. On April 23, 1992, Major Freeman recommended that Smith's take home privileges be revoked for 14 days and more severe disciplinary action if future incidents of this type occurred.

On May 13, 1992, Major Freeman recommended that Smith's take home privileges be revoked for 30 days because of two incidents of speeding within a 45 minute span on May 12, 1992 in which he was clocked at 30 miles per hour over the posted speed limit. Smith did not have *any* accident as a result of these incidents. On May 22, 1992, Major Freeman recommended that Smith's take home privileges be revoked for an additional 2 weeks because he was scheduled for military leave during the 30 day period. Major Freeman also recommended that Smith be terminated if he had any more accidents because he believed that the County was dealing with a negligent retention problem.

In January 1993, Major Freeman received a memo from Captain Lowery reporting that Smith damaged his vehicle after driving into an area which had flooded. Major Freeman received a supplemental memo from Captain Lowery reporting that there was no serious damage to the vehicle. Sgt. Thomas had advised all the officers assigned to the flooded areas to use caution. Smith had not initially been truthful about the incident. Major Freeman agreed with Captain Lowery's recommendation to revoke Smith's take home privileges for 180 days because Smith had a history of bad driving habits, he was cautioned about going into high water, there was evidence that his vehicle had been driven into deep water, and he was untruthful about the incident.

On February 14, 1993, Smith was given an oral reprimand for effecting a traffic stop on his way to a dispatched call.

In early June, 1993, Major Freeman was informed that Smith was seen in the company of a female at the Forest City Gun Club with his gun belt off while on duty after he failed to respond to a radio call to assist another officer. After an Internal Affairs investigation was conducted, Major Freeman met with Smith and Smith's supervisors to discuss the incident. He advised Smith that he should have answered the radio call and that he should not have been in a secluded area with his gun belt off. Major Freeman gave him a written reprimand, approved by Chief Davin.

On August 9, 1993, Major Freeman met with Smith and his supervisors about a problem with Smith being unfamiliar with his division and the location of businesses. Smith was advised to improve his knowledge of locations and response time and that any recurrence of these infractions would result in disciplinary action.

On September 26, 1993, Smith's police vehicle was hit in a parking lot while he was in a restaurant. In January,

1994, Smith's police vehicle was backed into at the drive thru of a restaurant. There was no disposition of these incidents.

During the time that Al St. Lawrence was Chief of Police, he followed Major Freeman's recommendations regarding disciplinary action against Smith. During the time that Major Davin was Chief of Police, he followed Major Freeman's recommendations regarding disciplinary action against Smith.

On November 18, 1994, Smith was involved in an automobile accident in his police vehicle on his way to work. (App. D, Aff. Lowe, ¶ 5) Chief Lowe was informed that the accident was serious and that the driver of the other vehicle had been taken to the hospital. (*Id.*) He requested an Internal Affairs investigation because of the seriousness of the accident. (*Id.*)

During the course of the invesigation, Chief Lowe was informed that the other driver, Mr. Krippene, died and that the City of Savannah was charging Smith with speeding and homicide in the second degree. (App. D, Aff. Lowe, ¶ 6) On November 29, 1994, Chief Lowe suspended Smith without pay pending the outcome of the Internal Affairs investigation. (*Id.*, ¶ 7) Chief Lowe decided to suspend Smith because of the seriousness of the accident and the seriousness of the charges against him. (*Id.*) He did not believe that it was in the best interest and general welfare of the County and its citizens to allow Smith to continue working during the investigation. (*Id.*) He referred Smith to a psychologist to assist him in dealing with the stress of the accident and to determine his fitness for duty to ensure the safety of the citizens of the County. (*Id.*)

The Internal Affairs investigation concluded that Smith had exceeded the posted speed limit and had violated S.O.P. #10-040 which requires the driver of any police

vehicle to operate the vehicle in a reasonable and safe manner and to comply with the motor vehicle laws and traffic regulations. (App. D, Aff. Lowe, ¶ 8)

Chief Lowe reviewed the disciplinary actions in Smith's personnel file which showed that Smith had a history of speeding, automobile accidents, incidents involving poor judgment and failure to follow departmental policy. (App. D, Aff. Lowe, ¶ 9) Chief Lowe decided to terminate Smith because he believed that Smith was a liability to the County and to the citizens of the County. (*Id.*, ¶ 10) On January 12, 1995, Chief Lowe notified Smith of his termination. (Petitioner's App. D) Smith was acquitted of the vehicular homicide charge. The charge of driving too fast for conditions was dismissed.

The County did not officially sanction its police officers to violate the law or to inflict constitutional injuries on *any* citizens. Chief Lowe testified that in his opinion, prior to Mr. Krippene's death, there was evidence in Smith's file that would demonstrate a pattern of a habitual violation that "*could*" endanger the citizens of Chatham County. (Petitioner's App. H, Lowe depo., p. 37) Chief Lowe also testified that he would not have terminated Smith if Smith's personnel file had been brought to his attention prior to Mr. Krippene's death. (App. E, Lowe depo., p. 38) He would have investigated further to see if there had been a consistency of discipline given to Smith. (*Id.*, p. 39-40) A consistency of discipline was given to Smith and he was appropriately terminated after a series of progressive disciplinary actions. Chief Lowe did not *ever* substantiate Petitioner's suggestion of a pattern of reckless disregard of public safety on the highways and streets. When asked whether there were any officers who demonstrated a pattern of reckless disregard of public safety on the highways or the streets, such as Bryan Smith demonstrated, Chief Lowe replied, "There probably have been." (App. E, Lowe depo., p. 115) When asked about

any specific incidents, Chief Lowe could not recall any. (*Id.*, p. 115-116)

The Police Department did *not* allow its officers to violate state law. The Police Department policies require officers to follow state law when driving police vehicles. (App. D, Aff. Lowe, ¶ 3-4. Furthermore, nowhere is it stated on pages 21 and 22 of Neal Owens' deposition, or anywhere else, that it was the Police Department's policy to allow police officers, when not responding to a call, to exceed the speed limit in violation of state law. (App. F, Owens depo., p. 21-22) Corporal Owens testified that a supervisor was to be notified if a police officer was caught speeding. (*Id.*, p. 12, 23)

Cpl. Owens testified that he did not know whether it was a policy or practice not to write a speeding ticket to a police officer. (App. F, Owens depo., p. 13-14). He testified that he was advised by Lt. Hill that if he saw officers speeding, to let their supervisors know. (*Id.*, p. 12, 15-16; App. B, Freeman depo., p. 44)

Major Freeman testified that it was entirely up to the supervisor whether to issue a citation. (App. B, Freeman depo., p. 43-44). Major Freeman could have ordered that a citation be given to Smith on May 12, 1992, but he did not because he believed that the 30 days loss of take home privileges was sufficient as a form of discipline. (*Id.*, p. 44-45) Major Freeman ordered Sgt. Nichols to cite Smith for following too close after Smith's accident on April 20, 1992, in which the accident investigation concluded that Smith had been traveling faster than he had indicated.

Former Chief St. Lawrence testified that it is up to the officer on the street whether to issue a ticket to a speeding officer. (App. A, St. Lawrence depo., p. 52-53) He also testified that the officer was disciplined whether or not he received a ticket. (*Id.*, p. 53)

Petitioner's characterization of Major Freeman, or any persons below the level of Chief, as a policy maker is disputed. The *only* persons who constitute policy makers regarding the training, supervision and discipline of County Police Officers are those who served as Chief of Police when Smith was a police officer: Chief St. Lawrence, Acting Chief Davin, and Chief Lowe. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 99 L. Ed. 2d 107, 118-119, 108 S. Ct. 915 (1988). Major Freeman as commander of the Patrol Division was only authorized to *recommend* disciplinary actions to the Chief. Neal Owens was certainly not a policy maker. In fact, Owens was an Advanced Police Officer when he worked for the County Police Department! (App. F, Owens depo., p. 16)

Petitioner's reliance on the testimony of Corporal Leopold to demonstrate a policy of allowing officers to violate state law is without merit because Corporal Leopold was not a policy maker. He did not have final authority on disciplining officers under his supervision. (Petitioner's App. I, Leopold depo., p. 15) Smith had only one accident when he was under Cpl. Leopold's supervision and therefore Cpl. Leopold could not testify about whether consistency of discipline was imposed. (*Id.*, p. 14)

Petitioner never named Bryan Smith as a defendant. Counsel for Petitioner acknowledged during oral argument before the Court of Appeals that Smith's conduct did not constitute a constitutional deprivation. Respondents deny that Smith was acting in a manner directly related to the performance of police duties when the accident occurred. He did not have authority to violate the law. He was terminated after the accident. Since Smith was not acting under color of state law when the accident occurred, Petitioner's Section 1983 claim fails. *Almand v. DeKalb County, Georgia*, 103 F. 3d 1510, 1513-1514 (11th Cir. 1997). The accident could have happened if

Smith had been driving his family car to work. Causation is questionable because Mr. Krippene pulled out in front of Smith who had the right of way. Corporal Simpkins, an accident reconstructionist, testified that if Smith had been traveling the speed limit, the accident could have been avoided *or* the damage to Mr. Krippene's car would have been less severe, clearly showing that the accident still could have happened.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS FOR GRANTING A WRIT WHEN THE AUTOMOBILE ACCIDENT INVOLVING MR. KRIPPENE AND A CHATHAM COUNTY POLICE OFFICER DRIVING TO WORK DOES NOT CONSTITUTE A CONSTITUTIONAL DEPRIVATION THAT COULD SUBJECT RESPONDENTS TO LIABILITY UNDER 42 U.S.C. § 1983.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10. There is no compelling reason for granting the writ because the law is clear that an automobile accident involving a police officer merely driving his vehicle to work and a citizen who is injured does not constitute a constitutional deprivation. There is no split in any of the circuits regarding municipal liability in the case of an automobile accident between a citizen and police officer not involving a high-speed pursuit or an emergency. Petitioner is simply trying to circumvent the County's sovereign immunity by inappropriately attempting to convert a state law tort claim into a constitutional claim. Allowing Petitioner to accomplish this goal would defeat the sovereign immunity of local governments and create a cause of action against local governments not intended under Section 1983.

The proper analysis of a Section 1983 claim against a local government requires the following determination: (1) whether the alleged harm to a plaintiff was caused by a constitutional violation and, (2) if so, whether the local government or municipality was responsible for the violation. *Collins v. Harker Heights,* 503 U.S. 115, 120, 117 L. Ed. 2d 261, 270, 112 S. Ct. 1061 (1992).[1] Petitioner has failed to establish that the alleged harm to Mr. Krippene was caused by a constitutional violation.

Before a local government can be liable under 42 U.S.C. § 1983, there must be a constitutional deprivation and no constitutional deprivation is present in this case. "[A] person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Rooney v. Watson,* 101 F. 3d 1378, 1381 (11th Cir. 1996) (citing *Cannon v. Taylor,* 782 F. 2d 947, 950 (11th Cir. 1986)). Even if Smith's driving over the speed limit in the absence of an emergency or police pursuit constitutes gross negligence, it does not transform a state negligence claim into a constitutional violation. *Id. See also Banks v. Patton,* 210 Ga. App. 62, 63, 435 S.E. 2d 68, 70 (1993) (42 U.S.C. § 1983 is not intended to circumvent sovereign immunity in negligence cases).

Petitioner's claim that the County is liable under 42 U.S.C. § 1983 for maintaining a policy of failing to adequately train police officers to drive safely and allowing a pattern of reckless driving by its police officers is without merit because there is no constitutional deprivation. "[A]n inquiry into a governmental entity's custom or policy is relevant *only* where a constitutional deprivation has occurred." *Rooney, supra* (citing *Roach v. City of Fred-*

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[1] Petitioner's statement that *Collins* involves a high-speed police pursuit is incorrect. *Collins* involves a municipal employee who died after entering a manhole to stop a sewer line.

ericktown, Mo., 882 F. 2d 294, 297-298 (8th Cir. 1989)) (emphasis added). *See also Vineyard v. County of Murray, Georgia*, 990 F. 2d 1207, 1211 (11th Cir. 1993).

The law in the Eleventh Circuit and this Court is clear that "no policy, practice, custom or usage can act to violate one's rights where no underlying constitutional deprivation has been shown." *Estate of Story Through McNair v. McDuffie County*, 929 F. Supp. 1523, 1528 (S.D. Ga. 1996), aff'd, 110 F. 3d 798 (11th Cir. 1997), (citing *Linder v. Richmond County, Georgia*, 844 F. Supp. 764, 768-69 (S.D. Ga. 1994), aff'd, 38 F. 3d 574 (11th Cir. 1994)); *Rock v. Lowe*, 893 F. Supp. 1573, 1583 (S.D. Ga. 1995) and *Lyle v. Dodd*, 857 F. Supp. 958, 967 (N.D. Ga. 1994). *See also City of Los Angeles v. Heller*, 475 U.S. 796, 799, 89 L.Ed.2d 806, 106 S. Ct. 1571 (1986). "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* [unconstitutional conduct] is quite beside the point." *Heller*, 475 U.S. at 799, 89 L. Ed. 2d at 811. (emphasis added by the Court).

Petitioner's reliance on Division 3 of *Cannon* is completely misplaced. *Rooney* and *Vineyard* were decided after *Cannon* and therefore control. *City of Los Angeles v. Heller* was decided two months after *Cannon*. In *Rooney*, the Court of Appeals effectively rejected the analysis in *Cannon* of municipal liability since there was no underlying constitutional deprivation. *Rooney, supra.* Furthermore, *Cannon's* analysis of municipal liability for failure to train is based on a standard of gross negligence which has been rejected by this Court. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ——, 137 L. Ed. 2d 626, 641, 117 S. Ct. 1382 (1997); *Anderson v. City of Glenwood, Ga.*, 893 F. Supp. 1086, 1088 (S.D. Ga. 1995).

Petitioner's reliance on *Lewis v. Sacramento County*, 98 F. 3d 434 (9th Cir. 1996), is without merit because

the Court of Appeals focused on the standard of liability for *officers* in the context of high-speed vehicular pursuits, not local government liability. *Id.* at 439, 441. The "broad spectrum" in the circuits referred to in note 5 deals with labels given by courts to the standard of conduct of *officers* in cases involving an underlying constitutional violation, not a simple automobile accident. *Id.* at 441 n. 5. The appeal before this Court in *Lewis* involves the standard of conduct with respect to the *officer's* entitlement to qualified immunity. *County of Sacramento v. Lewis*, S. Ct. No. 96-1337 (1997 WL 770156). Petitioner did not sue Bryan Smith in the instant case which does not involve a high-speed pursuit.

A simple automobile accident involving an officer driving to work can be distinguished from a high-speed pursuit or emergency because it is plainly obvious that the officer, or anyone else, should obey the traffic laws when driving to work. When the "proper response is plainly obvious to all without training or supervision", there is no municipal liability for failure to train. *Sewell v. Town of Lake Hamilton*, 117 F. 3d 488, 490 (11th Cir. 1997).

Petitioner's reliance on *Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989), is misplaced because a constitutional deprivation must occur *before* deciding whether the County had a custom or policy of inadequate training. In *Canton*, the Court assumed that there was a constitutional deprivation and concluded that "if a city *employee* violates another's *constitutional rights*, the city *may* be liable if it had a policy or custom of failing to train its employees and that failure caused the constitutional violation." *Id.* at 388-389 n.8, 392, 103 L. Ed. 2d at 426-427, 428 (emphasis added). *Collins, supra*, 503 U.S. at 122-123, 117 L. Ed. 2d at 272 (direct quote found in *Collins*). Furthermore, a municipality's failure to train was addressed in *Canton* in the context of a person who was allegedly denied medical treatment while in police *custody*. *Canton*, 489 U.S. at 381-382, 103

L. Ed. 2d at 421-422. Mr. Krippene was not in the custody of the County.

In *Brown*, 520 U.S. ——, 137 L. Ed. 2d at 636, 640-641, this Court's analysis of Bryan County's liability for hiring Deputy Burns was based on the assumption of an underlying constitutional violation by Deputy Burns of excessive use of force.

Even if an underlying constitutional deprivation is assumed, there is no evidence whatsoever that deliberate action by the County directly caused the alleged violation of Mr. Krippene's constitutional rights. *Brown*, 520 U.S. at ——, 137 L. Ed. 2d at 639; *Canton, supra*, 489 U.S. at 385, 103 L. Ed. 2d at 424. "Deliberate indifference" is a "stringent standard of fault" requiring proof that a municipal actor disregarded a known or obvious consequence of his actions. *Brown*, 520 U.S. at ——, 137 L. Ed. 2d at 643. Adherence to an inadequate training program which does not prevent constitutional violations may constitute deliberate indifference. *Id.*, 520 U.S. at ——, 137 L. Ed. 2d at 641. Showing that an officer was unsatisfactorily trained is not sufficient. *Canton*, 489 U.S. at 390-391, 103 L. Ed. 2d at 427-428.

Chatham County was not deliberately indifferent to the constitutional rights of its inhabitants in the training of its police officers. *Canton*, 489 U.S. at 392, 103 L. Ed. 2d at 428-429. The County adequately trains its police officers. *Anderson*, 893 F. Supp. at 1090. The Police Department requires its officers to be certified by the Georgia Peace Officers Standards and Training Council ("P.O.S.T.") and to take the continuing education requirements imposed by P.O.S.T. *See* O.C.G.A. §§ 35-8-8, 35-8-9, 35-8-10, and 35-8-21 (state law requirements on minimum training of peace officers). Officer Smith received his police certification from P.O.S.T. on July 10, 1990. The Basic Law Enforcement Training Course included instruction regarding motor vehicle laws and police vehicle operation. During the time that he worked in the Police

Department, Smith met the P.O.S.T. requirements for continuing education of 20 hours per year. On February 7, 1992, after he had an at fault accident on August 14, 1991 and a not at fault accident on January 29, 1992, Smith completed a course entitled "Basic Emergency Vehicle Operations" which included training on motor vehicle laws and police vehicle operation.

Before the accident with Mr. Krippene, the Police Department had in place S.O.P.'s and General Orders to be followed by all sworn officers. (App. D, Aff. Lowe, ¶ 3-4) There are S.O.P.'s entitled "Vehicle Operation" and "Emergency Vehicle Operation". (*Id.*, ¶ 3) S.O.P. # 10-040 requires officers to operate their police vehicles in a reasonable and safe manner, exercising due caution and judgment and to comply with the motor vehicle laws and traffic regulations except when in actual pursuit or responding to an emergency. S.O.P. # 10-016 sets forth the policy on emergency operation of police vehicles and specifically quotes O.C.G.A. § 40-6-6, the state law on that subject.

Petitioner's assertion that Respondents failed to reduce the risk of harm to Mr. Krippene is without merit. *Canton, supra,* 489 U.S. at 390-391, 103 L. Ed. 2d at 428. The County appropriately supervised Smith. After Smith's accident in August, 1991 and January, 1992, he received further training. No injuries were reported after his accident on April 20, 1992 and after his speeding infractions on May 13, 1992. The Police Department warned officers to exercise caution in areas with high water in January, 1993. Smith's conduct of driving into deep water on January 20, 1993 did not constitute *any* injury to any citizen and did not warrant termination. His accidents in Spanky's parking lot and Krystal's drive thru on September 26, 1993 and January 8, 1994 were not his fault and no citizens were injured.

The County did not tacitly authorize any actions on the part of Smith or any other officer. Smith was appro-

priately disciplined pursuant to Chatham County's policy of progressive discipline of its employees.

In 1991, Smith was appropriately disciplined. He demonstrated poor work performance and was warned of possible termination if no significant improvements were made. In an effort to resolve the problem, Major Freeman transferred Smith to a different watch to be evaluated by another supervisor. Smith received an oral reprimand for failing to service his police vehicle. After his first accident on August 10, 1991 in which no injuries were reported, Smith's take home privileges were revoked for three days and he was warned of more severe disciplinary action for future occurrences. In October, 1991, further counseling was provided about Smith's overall work performance.

In 1992, Smith was appropriately disciplined. His take home privileges were revoked for fourteen days after an at fault accident on April 20, 1992 in which no injuries were reported. Smith's take home privileges were revoked thirty days after he was clocked speeding twice within forty five minutes on May 12, 1992. Smith was not in *any* accident as a result of the speeding incidents.

In 1993, Smith was appropriately disciplined. His take home privileges were revoked 180 days after he drove his vehicle into deep water. There is no evidence whatsoever that anyone's constitutional rights were violated as a result of this incident or that anyone was injured. Smith was given a written reprimand for being in a secluded area with a female with his gun belt off.

Smith's work performance problems occurred primarily during his first year at the Police Department. He was counseled about his deficiencies and warned of more severe action if the problems continued. He was disciplined in the same manner for automobile accidents in which he was found to be at fault. After the accident with Mr. Krippene, Chief Lowe took the final step in the County's progressive discipline system and exercised his discretion

in suspending and terminating Smith. (App. D, Aff. Lowe, ¶ 7-10)

The County appropriately disciplined and supervised other officers of the Police Department. (App. D, Aff. Lowe, ¶ 12-16)

Petitioner's reliance on *Nishiyama v. Dickson County, Tennessee*, 814 F. 2d 277 (6th Cir. 1987), is misplaced. In *Nishiyama*, the sheriff's department authorized a convicted felon in its custody to drive a patrol car with blue lights. *Id.* at 279. The inmate beat the victim to death. *Id.* The Sheriff had a policy and practice of allowing the inmate to have unsupervised use of Dickson County patrol cars. *Id.* The Court stated that the Sheriff's conduct was outrageous. *Id.* at 283. *Nishiyama* does not apply because it preceded *DeShaney v. Winnebago Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), and *Collins* and was not guided by those decisions. *Lovins v. Lee*, 53 F. 3d 1208, 1211 (11th Cir. 1995).[2] Furthermore, the conduct of the Chatham County Police Department was reasonable. Officer Smith was adequately trained and disciplined. He was not a criminal in the custody of Chatham County. He did not purposefully hit Mr. Krippene's vehicle nor did he commit a crime, as in *Nishiyama*. No injuries were reported regarding Smith's infractions prior to November 18, 1994. There is no evidence of any conduct which is outrageous or "shocks the conscience."

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[2] The Constitution imposes upon the government the duty to protect particular individuals in limited circumstances such as prisoners and persons involuntarily institutionalized. *DeShaney*, 489 U.S. at 198-199, 103 L. Ed. 2d at 260-261. *Lovins*, 53 F. 3d at 1210; *Collins*, 503 U.S. at 127, 117 L. Ed. 2d at 274. A government is responsible for the safety and well-being of an individual when it takes him into its custody and holds him there against his will. *Lovins, supra.* Mr. Krippene was not in the custody of the County when the accident happened. He was a member of the general citizenry on a routine trip to the Post Office. *See Lovins, supra.*

The County did not abuse its power or employ it as an instrument of oppression. *Collins*, 503 U.S. at 126, 117 L. Ed. 2d at 274. There is a presumption that the administration of government is based on a rational decision making process. *Id.* Decisions regarding training of County police officers are appropriately made by local officials rather than this Court. *Id.* at 128-129, 117 L. Ed. 2d at 275. *See also Canton, supra*, 489 U.S. at 392, 103 L. Ed. 2d at 428-29. "The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions." *Collins, supra*, at 129, 117 L. Ed. 2d at 275.

CONCLUSION

The Eleventh Circuit Opinion and District Court Opinion correctly applied the controlling precedent of this Court and did not erroneously decide any questions of law. The petition should be denied.

Respectfully submitted,

THOMAS J. MAHONEY, JR.
Counsel of Record
EMILY E. GARRARD
CHATHAM COUNTY ATTORNEY'S OFFICE
P.O. Box 8161
Savannah, GA 31412
(912) 652-7881
Attorneys for Respondents

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

VS.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA, POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA

Defendants.

Transcript of Deposition of SHERIFF AL ST. LAWRENCE, taken by counsel for the Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 5th day of February, 1997, beginning at approximately 2:10 p.m.

* * * *

[11] Q What if his performance in the Sheriff's Department had been totally unacceptable by his superiors?

A I don't know that was the case.

* * * *

[15] Q The document speaks for itself. My question is this at this point. Why was this man hired when he had an evaluation on March 19, 1991 from the Sheriff's Department of being totally unacceptable?

A His evaluation on his particular job performance, whatever he was doing there was totally unacceptable is what the Undersheriff here says.

Q Well, you told me earlier in the deposition—

A —I don't know that I've ever seen this. I don't know that I had seen it at the time I hired him.

* * * *

[52] Q Well, let me ask you this. What was the policy at the time that you left as to whether or not police officers received speeding tickets if they were caught speeding under a circumstance of this nature?

A They were disciplined.

Q Did they receive a ticket?

A They should have, yes.

Q And, if they didn't—

A —That was up to the agency that clocked him.

Q Okay. If it was Chatham County agency, Chatham County Police officers.

A Uh-huh. The officers are not above that.

Q I hope not.

A That's what I'm telling you.

Q If he did not receive a written ticket, was he above what citizens—other citizens are treated?

[53] A Every citizen that's clocked don't get a ticket, but I mean, you know, I can't speak to that because I don't know.

Q Going back to my original question, if a police officer is caught speeding while operating a Chatham County police vehicle and he is not responding to a call or an emergency or in pursuit the policy was under your command to issue a written ticket.

A No, that would be up to the officer on the street.

Q Okay.

A It wouldn't be up to me. I'm not the one trying to run him down and get him on radar for speeding.

Q Okay. So, there was really no—was it an arbitrary policy?

A No. No, my policy would have been to discipline him for speeding regardless of whether he got a ticket or not.

Q Okay. You would discipline him regardless of whether he got a ticket or not.

A That's exactly right. It wouldn't make any difference.

* * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

VS.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA,

Defendants.

Transcript of Deposition of MAJOR WILLIAM R. FREEMAN, taken by counsel for the Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 6th day of February, 1997, beginning at approximately 1:00 p.m.

* * * *

[11] Q Were you aware that when he came onto the police force in April of '91 that he had had a totally unsatisfactory evaluation by the Sheriff's Department immediately before his transfer?

A No.

* * * *

[43] Q Okay. We'll address that in just a moment. Let me ask you this. As I understand it Bryan Smith was

caught speeding on radar around lunch time going through a school zone.

A I would not know that—

Q —The particulars

A I don't know the particulars.

[44] Q Okay. Nevertheless, would he have been given a speeding ticket for these two incidents?

A He could have been, yes, but was not.

Q He was not.

A Apparently not. If he was, I'm not aware of it.

Q Well, I'm not either. From a review of his file, and that's all we have.

A Yeah.

Q What was the practice of the Police Department as to issuing citations—uniform citation tickets for speeding to police officers?

A The practice there, if he was in a departmental automobile, and apparently he was, report it to the supervisor, which they did.

Q Right.

A And, there is disciplinary action taken.

Q Okay. But they aren't issued a citation?

A He could have. That would have been entirely up to the supervisor. It could have been—I could have ordered one given to him. I did not.

Q And, why didn't you?

A Because I thought I gave him enough.

Q Pardon me?

A I thought I give him enough discipline. I took his car for thirty days.

[45] Q Okay. Did you think he needed to go back to driving school at that time?

A Did I personally think that?

Q Yes, sir.

A I don't recall.

Q Do you think he should have been terminated at that time?

A Apparently if I had I would have recommended it. I did not.

Q Do you think his work performance was improving at that time from the July 2nd, 1991 memo?

A His work performance, apparently it did. Maybe his driving habits, but not his work habits.

Q Well, didn't you recognize that he could be a danger to the motoring public in general by operating a vehicle in the pattern that he was demonstrating?

A On this one particular time?

Q No. Leading up to this one particular time. Leading up to May—I'm sorry—whatever the date was—May 12, 1992.

A Let me answer that question. We took what I thought as Division Commander the disciplinary action that needed to be taken. Whether I thought he was an extreme danger to the public, no, I didn't think so.

APPENDIX C

[PLAINTIFF'S EXHIBIT 6]

CHATHAM COUNTY
HUMAN RESOURCES DEPARTMENT
Realty Building
24 Drayton Street, Suite 110
Savannah, GA 31401

June 7, 1991

Officer Bryan Smith
126 Neva Bluff Drive
Savannah, Georgia 31406

Dear Officer Smith:

The Chatham County Personnel Advisory Board, in accordance with the Personnel Ordinance and Procedures, heard your appeal on denial of promotion filed against the Sheriff's Department. Below are our findings:

1. Officer Smith received an annual performance evaluation on March 18, 1991, covering the period of April, 1990 through March, 1991.

2. During that time period, you were assigned to the Court Services Division and to the Street Division.

3. Your record reflects the following for that time period: Six Weeks—Peace Officers Standards & Training Academy; Five Weeks—Military Training; and Five Weeks—Assigned to Street Division.

4. The March, 1990 performance evaluation reflected a score of 27 out of a possible 33 points (met position requirements).

The November, 1990 Probation Evaluation reflected a score of 5.6 out of a possible 10 (met position requirements.

The March, 1991 Annual Evaluation reflected a score 4.4 out of a possible 10 (Fair—Must Improve to Satisfactory).

5. Testimony from Sergeant Hood revealed that Officer Smith's performance declined considerably from November to March of 1991. Examples of performance deficiencies that were cited include: Repeatedly leaving the assigned post; failure to secure lock-up; inappropriate court room behavior; and reports of problems during assignment to the Street Division.

6. You did not question the legitimacy of the incidents cited by Sergeant Hood. However, you did maintain that none of your supervisors, including Sergeant Hood, ever counselled or reprimanded you for performances deficiencies.

7. Sergeant Hood acknowledged that he did not execute formal disciplinary action against you in hopes that your performance would improve.

Based upon a thorough review of the written documents and testimony given at the Appeals Hearing, the Board renders the following determination.

The action of the Sheriff's Department was to extend the probationary period until June 30, 1991 in order to give you an opportunity to correct the performance deficiencies outlined in your evaluation.

Therefore, the Boards finds that the action taken by the Sheriff's Department does not constitute a denial of promotion. The decision on your promotion was postponed for three months in accordance with County policy.

Respectfully Submitted,

/s/ James Brown by
Barry Whitehead
JAMES BROWN
Acting Chairman

/s/ Roger Orr
ROGER ORR
Member

/s/ Robert J. Duffy
ROBERT DUFFY
Member

CC: Sheriff Walter Mitchell, Jr.

APPENDIX D

STATE OF GEORGIA)
)
COUNTY OF CHATHAM)

AFFIDAVIT OF RONALD LOWE, SR.

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, RONALD LOWE, SR., who first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendants' Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the United States District Court for the Southern District of Georgia, Savannah Division, entitled *Nancy Kimball Krippene, Individually, and as the Executrix of the Estate of Urban M. Krippene, deceased, v. Ronald Lowe, Sr., Individually and as Chief of Police of Chatham County Police Department; and Board of Commissioner of Chatham County, Georgia and Chatham County, Georgia, Political Subdivisions of the State of Georgia,* Civil Action No. CV496-211.

2. I am Chief of Police of Dayton, Ohio. I was Chief of Police of Chatham County from July, 1993 through March, 1995. As Chief of Police of Chatham County, I was selected by and reported to the County Manager. When I deemed it appropriate to terminate a police officer, I made a recommendation to the County Manager who had the final authority.

3. On October 1, 1994, I issued the Police Field Operations Manual to all sworn officers and all supervisors of the Police Department. The manual contains Standard Operating Procedures ("S.O.P.") which are statements of policy for the Chatham County Police Department. Em-

ployees of the Police Department are required to know and understand the S.O.P.'s while performing their duties. Copies of my notification about the manual, the mission statement of the Chatham County Police Department, and the table of contents for S.O.P.'s which apply to all divisions in the Police Department are attached. (Exh. 1) All sworn officers, including Bryan D. Smith, were given a manual. On or about November 1, 1994, in-service training on the S.O.P.'s was given to all sworn officers of the department, including Bryan D. Smith. A copy of S.O.P. #10-040, "Vehicle Operation", is attached. (Exh. 2) A copy of S.O.P. #10-016, "Emergency Vehicle Operation," is attached. (Exh. 3) This S.O.P. incorporates O.C.G.A. § 40-6-6 which requires the driver of an authorized emergency vehicle to drive with due regard for the safety of all persons.

4. The S.O.P.'s were adopted pursuant to General Orders, which are written directives. General Order # GO94-013, entitled "Vehicle Operation", was in effect when I left Chatham County. A true and correct copy is attached as Exhibit 4. True and correct copies of the prior orders on the same subject issued during my tenure are attached as Exhibits 4-1 and 4-2. General Order # GO91-007, "Vehicle Operation", was in effect when I became Chief. A true and correct copy is attached as Exhibit 4-3.

5. On November 18, 1994, I was notified that Bryan D. Smith was involved in an automobile accident in his police vehicle while he was on his way to work. I was informed that the accident was serious and that the driver of the other vehicle had been taken to a hospital. I requested an Internal Affairs investigation because of the seriousness of the accident.

6. During the course of the investigation, I was informed that the driver of the other vehicle died. I was also informed that the City of Savannah was charging Smith with speeding and homicide in the second degree under O.C.G.A. § 40-6-393(b).

7. On November 29, 1994, I wrote Smith a letter giving him official written notification that he was suspended without pay pending the outcome of the Internal Affairs investigation. (Exh. 5) I made the decision to suspend Smith because of the seriousness of the accident and the seriousness of the charges against him. I did not believe that it was in the best interest and general welfare of the County and its citizens to allow Smith to continue working during the investigation. I informed Smith that he was being referred to a psychologist to assist him in dealing with the stress of the accident.

8. The Internal Affairs investigation concluded that Smith had exceeded the posted speed limit and had violated County Police Department S.O.P. #10-040 which requires the driver of any police vehicle to operate the vehicle in a reasonable and safe manner and to comply with the motor vehicle laws and traffic regulations. (Exh. 2) Officer Scott Simpkins, an accident investigator who assisted with the investigation by Internal Affairs, concluded that Smith was traveling in excess of 65 miles per hour.

9. I reviewed the disciplinary actions in Smith's personnel file. The personnel file showed that Smith had a history of speeding, automobile accidents, incidents involving poor judgment and failure to follow departmental policy.

10. I decided to recommend termination of Bryan D. Smith after considering all the information that I had reviewed. I believed that Smith was a liability to the County and to the citizens of the County. On January 12, 1995, I wrote a letter to Smith informing him of my recommendation that he be terminated. (Exh. 6) He was informed that he could appeal. (*Id.*) He appealed and the Personnel Advisory Board concurred with my recommendation. The County Manager upheld the decision.

11. My termination letter to Smith refers to an accident involving Smith's vehicle. It states: "September 26,

1993 Auto accident, Spanky's parking lot in Pooler. No disposition." A copy of Smith's confidential on this accident is attached. (Exh. 7) I signed the confidential. There was no disposition because Smith's vehicle was hit in the parking lot while he was in the restaurant. My termination letter to Smith refers to another accident involving Smith's vehicle. It states: "January 8, 1994 Auto accident Krystal's parking lot, Garden City. No disposition." A copy of Smith's confidential on this accident is attached. (Exh. 8) There was no disposition because Smith's vehicle was backed into at the drive thru of the restaurant.

12. During my tenure as Chief of Police of Chatham County, I disciplined and terminated other police officers.

13. I recommended the termination of Officer J.J. Famiglietti. I made this recommendation because of repeated acts of insubordination on May 30, 1994, his failure to follow a directive by his commanding officer and a history of violations of personal conduct. On September 9, 1993, I had suspended him for 10 days without pay for being intoxicated in a public place while he was off duty and requesting a County officer not to write a report about a patron who fell.

Mr. Famiglietti's personnel file also showed other incidents for which he was suspended. In 1992, he was suspended without pay for 5 days for discharging a firearm at the Bull River Yacht Club Dock. In 1987, he was suspended without pay for using his blue lights and siren without authorization.

The Personnel Advisory Board agreed with my recommendation to terminate Mr. Famiglietti, and the County Manager upheld the termination.

14. On April 5, 1994, I approved the recommendation of Major Young to suspend Officer Overholser for 3 days without pay for conduct unbecoming an officer during a traffic stop.

15. On December 8, 1994, I recommended the termination of Officer Wyche. Mr. Wyche was clocked speeding on December 7, 1994. He radioed to the officer who clocked him and asked if he was going too fast. The officer told him that he was going "way too fast". Mr. Wyche stated in his report, known as a "Confidential", that he was in pursuant of a vehicle. Investigation of the incident reflected that there was no radio communication about any pursuit. It was concluded that Wyche had created a phantom vehicle and was simply speeding on his way to work. I recommended termination because Mr. Wyche violated Georgia law and departmental policy and was untruthful. On September 6, 1994, I had suspended Wyche without pay after he was charged with simple battery under the Domestic Violence Act.

16. On January 18, 1994, I gave a written reprimand to Officer J.A. Gonzalez. The day before, Officer Gonzalez was involved in a collision after passing a vehicle within 100 feet of an intersection. He was responding to a domestic dispute but was not traveling Code 3. I warned Officer Gonzalez in my written reprimand that any further violation would result in harsher disciplinary action, up to and including loss of pay and a loss of days worked.

17. At all times I acted in good faith within my discretionary authority in the performance of my official duties as Chief of Police. I exercised my judgment in a reasonable manner and followed the policies and procedures of Chatham County and the Chatham County Police Department to the best of my ability.

Further deponent sayeth naught.

/s/ Ronald Lowe, Sr.
RONALD LOWE, SR. (L.S.)

[Notary Omitted in Printing]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,
Plaintiff

-vs-

RONALD LOWE, SR., INDIVIDUALLY AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT
-and-
BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA
-and-
CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA,
Defendants

DEPOSITION OF RONALD LOWE, SR., taken before me, Norma J. deRoziere, a Certified Shorthand Reporter and Notary Public in and for the State of Ohio at large, as upon Cross-Examination, pursuant to Notice and Agreement, at the Dayton Police Department, Safety Building, Room 164, 335 W. Third Street, in the City of Dayton, County of Montgomery and State of Ohio, on Wednesday, the 22nd day of January, 1997, commencing at 8:00 o'clock A.M., on behalf of Defendants.

* * * *

[38] Q. If Bryan Smith's personnel file had been brought to your attention by one of the Majors prior to

Mr. Krippene's death, is it a fair statement that you would have terminated Mr. Smtih?

A. No.

Q. Would you have taken corrective action against him?

A. I would have had it investigated to find out what in fact had been done, if anything, pertaining to Bryan Smith, and some of the problems that were surfacing that was observed by myself in his background. If you have an individual that shows a consistency, and that is what I mean by consistency, which might be entirely different than the former Sheriff or any other Chief, but if there is a pattern of a lack of feeling, or disrgard for rules and regulations, then there needs to be [39] something set in place, be it discipline or whatever, some type of corrective action to see if in fact the employee will respond.

Q. And if the employee doesn't respond do you agree with me the employee should be terminated?

A. Under my consistency definition, yes.

Q. And did you see in Mr. Smith's personnel file that corrective actions that were taken didn't seem to work with him?

A. Yes, this is a fair statement.

Q. Even prior to Mr. Krippene's death the corrective action didn't seem to work with Mr. Smith?

A. That was basically one of the reasons that I recommended he be termintaed.

Q. My question is, prior to Mr. Krippene's death, if you had reviewed his file and seen that the corrective action had been done, such as suspending take-home privileges, vacation days, wasn't working, don't you agree with me he should have been trmianted?

A. No, I'm not saying that. If that in fact had been the reason, if the accident in fact had not been the reason for his personnel jacket being brought before me, then if his counseling or his take-home duties, or his—whatever discipline he had, then I would have looked at all of those situations. I can't speculate and say at [40] this point that I would have asked for termination on him. Had he just

had an accident, and not an accident with Mr. Krippene—is that his name?

Q. Right.

A. I can't honestly sit here now and say that. What I can say to you was when I interviewed him, and in looking at his history, and looking at his lack of—his not being able to follow instructions, and disregarding rules and regulations, and that was a perception on my part, I felt that he had total disregard for human life because of a statement that he made.

Q. Now which statement are you referring to?

A. About, "so I had an accident and the guy died."

Q. Now that was what you perceived as an attitude problem, or he just doesn't care about human life?

A. I just thought it was an attitude thing, but my main concern was, I showed him his history in driving. And I explained to him at that time, it's unacceptable, and that I was going to recommend to the County Manager that he be termianted because of the consistency in which these things had occurred, evern before I got there.

* * *

* * * *

[115] Q. Do you know, were there any officers that demonstrated a pattern of reckless disregard of public safety on the highways or the streets, such as Bryan Smith demonstrated?

A. There probably have been.

Q. You say there probably have been. I'm just asking if you recall any specific incidents in your [116] recollection today. I'm not asking for probables. I'm asking for what you can recall.

A. No.

Q. You can't recall any?

A. No.

MR. BERGEN: I believe that is all we have. Thank you very much.

Reserve the right to read and sign.

(WHEREUPON, Deposition Concluded—11:20)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No.: CV496-211

NANCY KIMBALL KRIPPENE, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,

Plaintiff,

VS.

RONALD LOWE, SR., AND AS CHIEF OF POLICE OF CHATHAM COUNTY POLICE DEPARTMENT; AND BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA, AND CHATHAM COUNTY, GEORGIA POLITICAL SUBDIVISIONS OF THE STATE OF GEORGIA,

Defendants.

Transcript of Deposition of CORPORAL NEAL OWENS, taken by counsel for the Plaintiff at 124 Bull Street, Savannah, Georgia, reported by Lucy B. Roberts, Certified Court Reporter, on the 24th day of February, 1997, beginning at approximately 8:05 a.m.

* * *

[12] Q Is that kind of what the policy that you'all would do, is not to pull over unmarked—I mean a marked unit?

A At the time we had had apparently a great deal of complaints on speeding patrol cars and I don't remember if it was written, I'm sure it was. The Traffic Unit officers were advised if we saw officers speeding to let their supervisor know. And, like I said, I was going to get with Bryan when [13] he cleared from his 33, you know, and see what kind of response I got out of him to see how I would take the next step.

Q So, at that time as you understood, there had been complaints. Was it from other citizens?

A Yes, sir.

Q Of patrol cars speeding not responding to a call, I take it.

A Apparently so.

Q Okay. And, as I understand, either you believe it was written or you were told. Do you think it was written?

A I don't recall. It's been so long ago, I don't recall.

Q But you understood that you'all were supposed to do—

A —Right.

Q —if you clocked somebody such as Bryan Smith who is going to lunch, speeding eighty miles an hour in a fifty-five mile an hour zone, report it to the supervisor.

A Right.

Q You weren't to write them up a ticket.

A No, sir.

Q Was it a—was it a policy not to write up a speeding ticket to a police vehicle?

A Not that I know of.

[14] Q But you understood that was the—for this particular time if you clocked a marked vehicle speeding, you were just to report it.

A Right.

Q Okay. You weren't to do any—you weren't to write a speeding ticket.

A Not to my knowledge, we were not supposed to.

Q. And, that was a department-wide policy for the Traffic Unit.

A I don't know if I'd call it a policy.

Q Or practice.

A That's what we were told to do.

Q That's what you'all were told to do.

A Uh-huh.

* * * *

[15] Q And, who would have given you that instruction?

A I think Lieutenant Hill was our Lieutenant when [16] that came out, if I'm not mistaken.

Q You didn't—you weren't in a supervising capacity —supervisory capacity of Bryan Smith, were you?

A No, sir.

Q He was—basically you'all were—I don't want to—

A —I was just a regular APO.

Q Okay. And, he was a regular APO at that time.

A Yes, sir.

Q You'all were on the chain of command equal.

A Yeah, we were—

Q —Parallel.

A —we were peons.

* * * *

[20] Q Right.

[21] A You're just a regular Joe Smoe riding around.

Q Isn't it true that he—Bryan Smith had not come back off of dinner break the second time that he was caught speeding?

A Yes, sir. He had already cleared up. He went 10-8 with Chatham.

Q Okay. He had already—okay—I'm glad you explained that to me. The first time he was cleared to go to dinner.

A. Right. He was in route to wherever he was going to eat.

Q Okay. And, then the second time within forty-five minutes, had he gone back on patrol or was he still—

A —No, he had already cleared up.

Q Okay.

A And, went 10-8 back in service.

Q And, the second time he was not responding to an emergency call, was he?

A No, sir.

Q He wasn't using his blue lights, was he?

A No, sir.

Q So, he is subject to the same Georgia motor vehicle laws that you—that I'm subject to.

A Same uniform rules of the road.

Q Okay.

[22] A Just like anybody else.

Q However, he—if Fred Bergen or Emily Garrard was going down Islands Expressway at eighty or eighty-one miles an hour, you would have pulled us over, wouldn't you?

A Definitely.

Q And, you would have issued us a ticket.

A Probably so.

Q Okay.

(Note: Off the Record)

(Note: Record Resumed)

Q (By Mr. Bergen) Basically you would have written up a citizen—

A —Yes, sir.

Q —for the same violations that Bryan Smith on both occasions.

A Right.

Q By virtue of the fact that he was a policeman on your same—with your same authority, you didn't write him up.

A Right.

Q Give him a ticket in other words.

A Right.

Q And, is that what the practice was—

MS. GARRARD. —I think he's already answered that question. You've already asked him that several [23] times about what the practice was or what he was instructed.

MR. BERGEN: I was going to ask him a different question.

Q (By Mr. Bergen) Was that—maybe I have, but let me just make sure I've got this straight in my mind. Was that—the practice of not writing up other police

officers done County wide—issuing police tickets, in other words?

A Well, I mean it's nothing written that you don't write police officers tickets. You know, I mean it's, you know, every profession has what they call professional courtesy. I've never written a police officer a ticket that I knew was a police officer.

Q But the police officers are not supposed to speed in their vehicles—

A —Right.

Q —unless they were responding to an emergency.

A Right, in a police vehicle, yes, sir.

Q And, as I understand it, someone superior to you instructed you—it was either in writing or orally—that if you'all caught anybody speeding to just report them to the supervisor.

A Right, to the supervisor.

Q Don't issue them a ticket.

A Right.

* * * *